A

LETTER

OF A

Gentleman to his Friend,

Shewing that the

BISHOPS

Are not to be

JUDGES

IN

PARLIAMENT

IN

CASES CAPITAL.

The L. Holly the Author

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SIR,

SInce you desire that I would let you know my opinion whether or no the Bishops may be present and Vote Judicially in Capital Cases which come to be Judged in Parliament, either in giving the Judgment itself, or in resolving and determining of any circumstance preparatory and leading to that Judgment, I must tell you that this is now become *Vexata Quæstio:* The two Houses of Parliament having therein been of different Opinions, the House of Peers declaring, that the Lords Spiritual have a right to stay and sit in Court, till the Court proceeds to the Vote of *Guilty* or *Not Guilty*, and the House of Commons on the other side insisting, That they ought not to have any Vote in

the proceedings upon the Impeached Lords.

And this Difference between the Houſes having been the unhappy occaſion of Proroguing the Parliament, may ſeem to lay an obligation upon every good Engliſh man, (if to me your ſatisfaction were not in the caſe) as to wiſh and pray heartily, that theſe differences may be well compoſed, that no more Remora's may be to obſtruct the proceedings of Parliament, but that the two Houſes may joyn with His Majeſty to ſettle this diſtracted Kingdom, and agree upon, then apply, all neceſſary remedies (and ſtrong ones they muſt be) for the prevention of thoſe miſchiefs, which the Enemies of the Proteſtant Religion and of this Government had been long Contriving and Plotting againſt us, and were now well nigh the atchieving and putting in Execution, if God of his infinite Mercy had not looked upon us, As this I ſay ought to be every mans wiſh and prayer, ſo it cannot but incite every man to ſatisfie himſelf

and

and others, where the Right is, and what he ought to have in his wiſhes: for that Right may prevail, is the natural wiſh of every good man, but good men many times differ in their apprehenſions what is Right.

Therefore it deſerves a ſtrict inquiry into the Practice of the Parliaments of former times in ſuch matters, and well to conſider upon what ground the Prelates were prohibited having Votes there in Caſes of Blood: For that is the Queſtion now before us, What was done heretofore, and what is now to be done in Parliament, that is to ſay in their Judicial way upon Tryals, not in their Legiſlative capacity paſſing Acts of Attainder, in which I know that Biſhops have born a part, but that is not now the queſtion.

Nor do I meddle with the General Queſtion, How far forth Clergy-men in Orders are forbidden having any thing to do with Secular matters: Nor what in that particular the Imperial Law requires, as that Reſcript of the Emperours *Honorius* and *Theodoſius*,

which Enacts, That Clergy-men ſhall have no communion with publick Functions, or things appertaining to the Court; Or the Decree of *Juſtinian*, That Biſhops ſhould not take upon them ſo much as the overſight of an Orphan, nor the Proving of Wills, ſaying it was a filthy thing crept in among them, which appertained to the Maſter of his Revenue: Nor what our Common Law of *England* ſeems to allow or diſallow, having provided a ſpecial Writ in the Regiſter upon occaſion of a Maſter of an Hoſpital, being it ſeems a Clergy-man, and choſen an Officer in a Mannor to which that Hoſpital did belong, ſaying it was **Contra Legem & conſuetudinem Regni, & non conſonum,** *It was contrary to the Law and Cuſtom of the Kingdom, and not agreeable to reaſon,* That he who had Cure of Souls, and ſhould ſpend his time in Prayer and Church-Duties ſhould be made to attend upon Secular Employments. I meddle not neither with what ſeems to be the Divine Law, as having been the Practice of the

the Apoſtles, and by them declared to be grounded upon Reaſon, and to be but what in reaſon ought to be, which was this, *That they ſhould not leave the word of God and ſerve Tables*, though that was a Church-Office: and yet they ſay, it is not reaſon we ſhould do that, for their work was the Miniſtry of the Word and Prayer, much leſs then were they to be employed in Secular affairs.

None of this I ſay is my buſineſs, my task is only to inquire, what the Law of Parliament is in this particular, and what is ſo, is the Law of the Land. And my method ſhall be, to run through all the Parliaments that are upon the Rolls in the Tower, and take notice of all the Tryals there Recorded, as well in Caſes Capital as in thoſe that were not ſo, and ſhew the difference in the Parliamentary proceedings upon them, how the Biſhops and Prelates did commonly joyn with the Temporal Lords in Judging ſuch as were not Capital (and not yet always ſo, when the Crimes were of a bigger

magnitude) but never but once when the Accuſation was for a Capital Crime, which was in the Duke of *Suffolks* Caſe, 28. *H.* 6. when the whole proceeding was ſo irregular and Unparliamentary, as it is to be wondered at, but certainly never to be followed, it is like the Bird in the Poet, *Rara avis in terris, nigroque ſimillima cygno*, as ſhall be ſhewed more particularly, when I take it up in its Order, as it is mentioned upon the Rolls. And ſo I come to my Narrative.

4. *E.* 3. *Roger Mortimer* Earl of *March*, Sir *Simon Bereford*, and others were Accuſed and Tryed in Parliament: And the Roll of that Parliament is ſo defaced, as it cannot be read; but 28. *E.* 3. *Roger* of *Wigmore* Coſin and Heir of that Earl of *March* deſires that Attainder may be examined; and by the whole proceedings there repeated, it appears, none of the Prelates were preſent, the words are **Dont le dit Sr. le Roi vous charge Countes, Barons, les Piers de ſon Roialme, que de ſi come ceſtes choſes**

ſes touchent principalement, a lui a vous & a tout le people de ſon Roialme que vous faciez au dit Roger droit & loial Juggement come affiert a un tiel daver. *Therefore our ſaid Lord the King charges you, who are Earls, Barons the Peers of the Realm, that as theſe things chiefly concern him and you and all the people of the Kingdom, ſo you give upon the ſaid* Roger *a right and legal Judgment, as it belongs to ſuch a one to have:* Then follows **Les queux Countes, Barons & Piers les articles par eux examinez revindrent, &c.** *Which Earls, Barons and Peers, having examined the Articles returned, &c.* And gave the Judgment, which was, that they ſhould ſuffer death: The Biſhops cannot be underſtood to be comprized here under the general name of Peers, ſince the Barons are firſt in rank, and beſides they cannot pretend to be Peers of the Realm.

5.E.3. The Parliament was declared to be called for the redreſs of the breach of the Laws and of the Peace of the King-

* Vid: Seldens Titles of Honor. Cap. 5. §. 32. pag 767. Part. 2. et pag. 702. Ibid in ye last line save five.

* But they may be comprized under ye Generall name of Barons soe ye Earles and Barons (spirituall or temporall) are all Peers. soe the Bishops are very many times comprized under ye Generall name of Lords. Vid. Statut. 1. Hen. 7. cap 3. 5. 6. 8. 10. see Statuta de Anno 1. Rich: 2. in ye preamble to ye 1. Chap: where Prelates are put before Duckes. &c. et 3. Rich. 2. in ye preamble to the first Chap. Bishops are comprized under ye word Lords, soe in ye Preamble ad statuta de Anno 10. Rich: 2. et. 12. Rich. 2. et. 13. Rich. 2. cap. 1. Gentlemen and Nobles.

Kingdom. Et pur ce que avis feust a les ditz Prelatz quil ne attenoit pas proprement a eux de conseiler du garde de la pees, ne de chastiement des tielx malueis, si alerent meſmes les Prelatz, &c. *And because the Prelates were of opinion that it belonged not properly to them to give Counsel about keeping the Peace nor punishing such evils, they went away by themselves,* and they returned no more. Et les ditz Countes, Barones & autres Grantz per eux meſmes. *And the said Earls, Barons and other great ones went by themselves*, and these return, and by the mouth of the Lord *Beaumont* declare their opinions, what was to be done, Commissioners to be appointed in every County of the best men (des plus grantz) they to be Gardeins de meſme le Comte, *Guardians or Conservators of the County.* These Commissions afterwards brought into Parliament, were read and approved by Noſtre Sr. le Roi, les Countes, Barons & autres Grantz, *our Lord the King, the Earls, Barons and other* hear

† They were not put out.

great ones, no Biſhops, ſo much as to hear the Commiſſions read, becauſe they were to enquire into all Crimes, as well Capital as other, the Prelates muſt have no hand in it. pag. 7.

In the ſame Parliament Sir *John Grey* and Sir *Will. de la Zouch* had quarrelled in the Kings preſence, Sir *John* had **mis mein au cotel** *laid his hand upon his Sword*, they had been impriſoned, and the buſineſs brought into Parliament, **Le Roi chargea de par la bouche le dit Mr. Geffrey le Scrope toutz les Countes, Barons & autre Grantz en les foies & ligeances queulx ils devoient au Roi de lui conſeiller ce quil devoit faire de ſi grand exceſſe fait en ſa preſance.** *The King by the mouth of Sir* Geffrey Scrope *charged all the Earls, Barons, and other great ones in their Faith and Allegiance, which they ow him, to give him Counſel, what he ought to do upon ſuch an exorbitancy committed in his preſence*; they go and conſider of it, acquit *Zouch*, judge *Grey* to Priſon: here were no Biſhops neither, to Judge ſo much as of a Battery. 25. *E.* 3. pag. 7.

25.E.3. The proceedings and Judgment of death againſt Sir *Will. de Thorp* Chief Juſtice, for Bribery, were brought into Parliament, which the King cauſed to be read **Overtement devant les Grantz de Parlement pur ſaver ent lour avys, & examine ſur ceo cheſcun apres autre ſi ſembla a eux toutz, &c.** *To be read openly before the* **Grantz,** *the great men, of Parliament to have their advice upon it, and being all asked one after another, it ſeemed to them all,* that they were very juſt, **Et ſur ceo il fut accorde par les Grantz de meſme le Parlement, que ſi nul autre tiel cas aveigne que noſtre Sr. Le Roi preigne lui des Grantz que lui plairra, pur per lour bon a vis faire ceo que pleiſe a ſa Roiale Seignurie,** *Upon this it was agreed by thoſe* **Grantz,** *thoſe Great men, of the Parliament, that if any ſuch other caſe ſhould happen, our Lord the King might take any one of thoſe* **Grantz** *thoſe Great men, whom he ſhould pleaſe, to do by their good advice what he ſhould think good.* It cannot be underſtood any Biſhops were here

here under the name of Grantz, and to be of the number of thoſe whom the King ſhould take to aſſiſt and adviſe him in ſuch other Judgments of death for the time to come, if occaſion were, which could be no employment for Biſhops, being to give Judgments of death.

42. *E.* 3. Sir *John de Lee* Steward of the Kings Houſe charged with ſeveral miſdemeanors, the Record ſaith, **Et apres manger vindrent les Prelats, Ducs, Countes, Barons, & aſcuns des Cões & illoeques feuſt fait venir Mr. John de Lee,** &c. *And after they had eaten, the Prelats, Dukes, Earls, Barons and ſome of the Commons came, and Sir* John de Lee *was fetcht thither, &c.* The buſineſs was there heard, and he was ſent to priſon. Here the Prelats were preſent, for the Crime was not Capital.

50. *E.* 3. Several perſons are accuſed even by the Commons for miſdemeanors, and the Biſhops preſent at their Trials and Judgments, as *Richard Lyons*, who had been Farmer of the Cuſtoms; the Lord *Latimer*, who was the

the Kings Chamberlain, for Oppreſſion in ſeveral places in *Britain* and in *England*, he was by the Biſhops and Lords adjudged to be impriſoned, and put to Fine and Ranſom; and then the Commons deſired, *he might loſe all his Offices, and no longer be of the Kings Council*, which the King granted. (Yet after this, 51. *E.* 3. at the requeſt of the Commons themſelves, he was reſtored to all, and declared innocent, which I take notice of by the way.) At this Parlament of 50. *William Ellis* of *Yarmouth*, as privy and acceſſary to the miſdemeanors of *Lyons*; *John Peach* of *London*, for getting a Monopoly of ſweet Wines; the Lord *John Nevil*, a Privy Counſellor, for buying ſome debts due by the King at eaſie prizes, to make advantage to himſelf: At all theſe Trials the Biſhops were preſent, and no body ſays but they might.

1. *R.* 2. *William de Weſton* and *John de Gomenitz* were tried for ſurrendring Towns and Caſtles in *Flanders* to the Kings Enemies; they had put in their Anſwers,

Anſwers, *Friday Nov.* 22. *Saturday* they are brought to the Parlament, and Sir *Richard le Scrope*, Steward of the Kings Houſe, **A commandement de Seigneurs avant-ditz**, *By the command of the Lords aforeſaid*, told them, That the foreſaid Lords, (and the Record tells you who thoſe Lords were,) **ceſt aſſavoir**; to wit, the Duke of *Lancaſter*, the Earls of *Cambridge*, *March*, *Arundel*, *Warwick*, *Stafford*, *Suffolk*, *Salisbury* and *Northumberland*, and the Lord *Nevil*, Lord *Clifford*, & **pluſours autres Seigneurs, Barons & Bannerettes eſteants au dit Parlement ſavoient aſſemblez & aviſez**, *Many other Lords, Barons and Bannerets being in the ſaid Parliament had met and adviſed upon it*, from the time they had put in their Anſwers, and found they were not ſatisfactory; and then gave ſentence, ſaying, that thoſe Lords had adjudged them to death: firſt *Weſton* was called, and this ſaid to him, and then *Gomenitz*: Here was none of the Prelats named, and it cannot be imagined they ſhould be under

der the general expreſſion, & autres Seignieurs, Barons & Bannerettes, *And other Lords, Barons and Bannerets*, after the naming of two Barons, for if there had been Biſhops, they would have been named before them. Obſerve likewiſe, that no Biſhops were preſent from the time that the Priſoners Anſwers came in, to have Vote, and determine concerning any part of their Anſwer, Pardon or whatever they had pleaded.

In the ſame Parliament, and the very next thing upon the Roll is the Caſe of *Alice Perrers*, accuſed for breach of an Ordinance made 50 *E.* 3. againſt Womens meddling with State Affairs, there the Record ſaith, that ſhe was, Fait venir devant les Prelats & les Seignieurs du Parlement pour y reſpondre, *Made to come before the Prelats and the Lords of the Parliament to make anſwer*; and then follows, Et ſur ceo par commandement des Prelats & Seignieurs le dit Mr. Richard le Scrope, rehercea l'Ordonance, *And then by the command of the*

the Prelates and Lords, the ſaid Sir Richard le Scrope *rehearſed the Ordinance.* And then ſhe was heard to the particulars with which ſhe was charged, and at laſt was adjudged to be baniſhed, and forfeit her Eſtate.

Obſerve in the Trial of *Weſton* and *Gomenitz*, that only thoſe Temporal Lords there named, had met and conſidered of the Anſwers put in by them, as preparatory for the Trial and Judgment, and no Biſhop preſent there: And here in the Trial of *Alice Perrers*, which followed immediately after, it is particularly expreſſed, that they were preſent, and did Vote and Judge as far forth as the Lords Temporal.

3 *R.*2. The two Merchants that had killed *John Imperial*, a Publick Miniſter ſent from *Genoa*, an Act of Parliament paſſed to make it Treaſon, the Biſhops had no Vote in the paſſing of this Act; the Record ſaith, Fait a remembrer que ceſt darrein Act iſſint faite fuſt fait par les Juſtices en preſence du Roy, & des Seigneurs Temporelz en ce Parlement, Memorandum, *that this*

this laſt Act ſo made was drawn by the Judges in the preſence of the King and the Lords Temporal in this Parliament. They were not ſo much as preſent when the Judges were in the preparing of it.

4 *R.* 2. Sir *Ralph de Ferrers* arreſted by the Duke of *Lancaſter* upon ſuſpicion of Treaſon, for holding intelligence with the *French*, brought into Parliament, and there tried; **Semblaſt as Seigneurs du Parlement que le dit Mr. Rauf eſtoit innocent**: *It ſeemed to the Lords of the Parliament that Sir* Ralph *was innocent.* Can any man think the Biſhops were there, and compriſed under the general expreſſion of **les Seigneurs du Parlement**? When they were preſent, it is always particularly expreſſed, as in *Alice Perrers* Caſe, 1 *R.* 2. and all thoſe queſtioned and puniſhed for miſdemeanors 50 *E.* 3. the Lord *Latimer* and *Lyon*, &c. *Alice Perrers* was **Fait venir devant les Prelats & Seigneurs du Parlement**, *was made to come before the Prelates and Lords of Parliament*; They were Judged by the Biſhops and Lords, the Record ſaith.

7 *R.* 2.

7 R. 2. The Biſhop of *Norwich*, who had undertaken an expedition into *France* and not performed the conditions, was charged with ſeveral miſcarriages and miſdemeanours in his employment, and one crime capital, which was betraying *Graveling* to the *French* for 10000 Franks in Gold, of which yet he cleared himſelf: Yet that being in for one of his charges, none of the Biſhops were preſent at his Trial, but *Michael de la Pool* gave this Judgment at the laſt, **Le Roi noſtre Sr. a bien entendu ce que vous avez dit, & ent a eu bone deliberation avec les Srs. Temporalz & ſemble au Roi & as Srs. Temporalz avant-ditz, que vos reſponſes ne ſont rien a propos, Parquoy del aſſent des Countes, Barons & autres Srs. Temporelz en ceſt Parlement eſt aſſentuz & accordez que vous ſoiez en la merci le Roy, & mis a fin & a taunceon,** *Our Lord the King hath well heard what you have ſaid, and hath with his Lords Temporal well conſidered of it, and it ſeems to him, and to the*

Lords Temporal aforeſaid, that your anſwers are nothing to the purpoſe, Therefore by the conſent of the Earls, Barons, and other Lords Temporal in this Parlement, it is agreed that you ſhall be at the Kings mercy, and put to fine and ranſom.

The Chancellor likewiſe gave judgment in the ſame way that Parliament on Sir *William de Elmham*, Sir *Thomas Trivet*, and others for giving up Holds and Fortreſſes, and taking money for them.

10 *R.* 2. *Michael de la Pool* Lord Chancellor was accuſed by the Commons for ſeveral miſdemeanors **devant le Roi, Prelatz & Seigneurs**, *Before the King, Prelates, and Lords.* Here the Prelates are Judges of miſdemeanors together with the other Lords.

11. *R.* 2. The five Lords Appellants, the Duke of *Glouceſter*, Earls of *Derby*, *Arundel*, *Worceſter*, and Earl Marſhal making their Proteſtations, that what they attempted touching their Appeals was for the honour of God, ſafety of the King, the Realm, and their own

own Lives, The Archbiſhop of *Canterbury* for himſelf and the whole Clergy of his Province entred a Proteſtation, and the Biſhops of *Durham* and *Carliſle* did the like; That they abſented themſelves from Parliament, in regard ſuch matters were to be there agitated, but with a *Salvo* to their right: Which ſome will have to be underſtood of a right to be preſent even when thoſe matters were in agitation, and that it was only upon ſome prudential conſideration that they did withdraw: But this could no ways be their meaning, but they proteſted their having a right to ſit and Vote in Parliament upon all other occaſions in the general, Though upon that occaſion they might not be preſent. The words of their Proteſtation make it evident: Nos Willielmus Cant. Archi-Epiſcopus pro nobis & ſuffraganeis Coepiſcopis, &c. proteſtamur quod intendimus & intendi volumus in hoc preſenti Parlemento & aliis intereſſe, conſulere, tractare, ſtatuere, & definire, &c.

ac cetera exercere cum ceteris jus interessendi habentibus in omnibus in eisdem statu & ordine nostro semper salvis: Verum quia in presenti Parliamento agitur de nonnullis materiis in quibus non licet nobis alicui eorum juxta sacrorum Canonum instituta quomodolibet personaliter interesse, eo propter protestamur quod non intendimus nec volumus sicuti de Jure non possumus nec debemus, dum de hujusmodi materiis agitur vel agetur quomodolibet interesse, sed nos penitus absentare, &c. *We* William *Archbishop of* Canterbury *for our selves, our Suffragans and fellow Bishops protest, that we do intend, and will be thought so to do, to be present in this and other Parliaments to consult, treat of, and determine,* &c. *and do other things together with others, who have right to be here, in all matters, our state and order always saved unto us entire in the same. But because in this Parliament some matters will be agitated, at any one of which by the institutions of the holy*

Canon

Canon Law we cannot be perſonally preſent, we do therefore proteſt, that we intend not, nor will not, as by the Law we ought not, nor can we in in any ſort be preſent, whilſt any of thoſe matters are in debate, or coming into debate: but we will abſent our ſelves altogether, &c. It is plain by the Record, that what they will have to be *Salvum* to them is their ſitting and acting **conſulere, & tractare, & ſtatuere,** *To conſult, treat of, and determine* in that and all other Parliaments, when ſuch matters are not in queſtion: But for ſuch matters they ſay, **Non licet alicui eorum perſonaliter intereſſe,** And **de jure non poſſumus nec debemus intereſſe,** *It is not lawful to be preſent in perſon at any of them, and rightly we cannot, nor ought not to be preſent.* Can it then be thought they ſhould lay claim to any right, to what they ſay **Non licet de jure non poſſumus nec debemus,** *It is not lawful, and by right we cannot, nor ought not?* And to ſay, their meaning was, that by the Law of the Land or Cuſtom of Parliament they might, and that it was

only the Canon Law which hindred them, can have little colour, for the Canon Law was to them above all Laws, and what was forbidden by that Law they could not have a thought, that it could in any ſort be lawful for them to challenge, as their right, upon any account.

It is further obſervable here, that they profeſs **Quod de jure non poſſumus nec debemus, dum de hujuſmodi materiis agitur vel agetur quomodolibet intereſſe,** that is, *all the time that ſuch matters are in agitation*; there is no exception of Preliminaries, and Preparatories, and of being preſent and having vote during all the debate, till the pronouncing of Sentence, for it is **Dum de hujuſmodi materiis agitur vel agetur,** the whole time from the beginning to the ending, and when ſuch buſineſſes are to come on, that is, when they are going upon them, and when they begin. And then conſider the cloſe of this Record, **Quelle Proteſtation leve en plein Parlement, al inſtance & priere**

priere du dit Erceveſque & les autres Prelatz ſuſditz, eſt enrolle, icy en Rolle du Parlement per commandement du Roy, & aſſent des Seigneurs Temporelz & Comunes, *Which Proteſtation being read in full Parliament, at the inſtant deſire of the Archbiſhop and other the Prelates aforeſaid, is entred upon the Parliament Roll, by the Kings command, with the aſſent of the Lords Temporal and Commons.* Which is all the formality of paſſing Laws in Parliament, that was uſed in thoſe times, Which was only to have it entred in the Roll or Journal Book, that ſuch a thing was agreed upon by the King and the two Houſes, then it was drawn into the form of a Law afterwards by the Juſtices and Kings Council, when the Parliament was riſen. So as whatever was the Law before, if it were only the Canon Law, it is now come to be the Law and rule of Parliament, and the Law of the Land; but in truth it was ſo before, and was always ſo.

20. *R.* 2. *Thomas Haxey* Clerk had preferred a Bill in the Houſe of Commons for regulating the outragious expences of the Kings Houſe, particularly of Biſhops and Ladies, **De la multitude d' Eveſques & lour meignee & auſſi de pluſours Dames & lour meignee qui demeurnt en l' hoſtel du Roy, & ſont a ſes couſtages,** *Of the many Biſhops, and their company, and alſo of many Ladies and their company, that live in the Kings Houſe, and at his charge.* The King being exceedingly moved at this, ſome Biſhops and Lords were ſent to the Commons to let them know it, and to enquire who had made that complaint; the Commons delivered the Bill, and his name who had exhibited it. *Haxey* was for this tried and adjudged a Traitor, and condemned to death for it. Which Judgment by the way was moſt unjuſt, and would not only have ſhaken, but wholly deſtroyed the very foundation of Parliament, deterring all men from repreſenting there, and ſeeking redreſs of any grievance

grievance publick or private, had it continued in force and unqueſtioned, but 1. *H.* 4. it was complained of as erroneous and **Encontre droit, & la courſe qui avoit eſte devant en Parlementz**, *Againſt right, and the courſe of Parliaments*; and therefore **Noſtre Sr. le Roi del aviz & aſſent de toutz les Srs. Spirituelx & Temporelx ad ordeignez & adjuggez, que le dit Juggement ſoit du tout caſſez, reverſez, repellez, adnullez & tenuz de nul force n'effect**, *Our Lord the King by the advice and conſent of all the Lords Spiritual and Temporal hath ordained and adjudged that the ſaid Judgment be wholly quaſhed, reverſed, repealed, made null, and held to be of no force nor effect.* So this Judgment is damned with Bell, Book and Candle (one may ſay) and at this the Lords Spiritual were preſent, and had vote, but not at the trial and condemnation of *Haxey*, as appears by the Record, which ſaith, **Fait a remembrer que meſquerdi aprez la Chandelure maintenant aprez le Jugement rendu devers** Thomas Haxey **Clere,**

Clere q; fuit ajuggez eu Parlement a la mort come Traitour, vindrent devant le Roy en Parlement ovek grand humilite l' Erceveſque de Cantirbirs & toutz les autres Prelatz, & luy prierent de ſa grace avoir pitie & merci du dit Thomas & de remitter l' execution. Memorandum, *that the Wedneſday after* Candlemas *day immediately after that Judgment was given upon* Thomas Haxey *Clerk, who was in Parliament judged to die as a Traitor, the Archbiſhop of* Canterbury *and all the other Prelates came with great humility before the King in the Parliament, and beſought his Grace to have pity and compaſſion on the ſaid* Thomas, *and to remit his execution, which the King granted.* So we ſee, that after the Judgment given in Parliament, the Biſhops immediately came into the Parliament, to beg for his pardon, which ſhews they were not there before.

21. R. 2. The Commons impeached *Thomas Arundel* Archbiſhop of *Canterbury* of high Treaſon, and deſired he ſhould

ſhould be put into ſafe cuſtody; it was anſwered, that becauſe it touched ſi haut perſonne, *ſo high a perſon*, the King would be adviſed. Afterwards they come and pray that Judgment may be given according to their Impeachment and accuſation of him, Sur quoy noſtre dit Sr. le Roy, & toutz le Srs. Temporelz, & Mr. Thomas le Percy eiant poair ſufficient de les Prelatz & Clergie du Roialme d' Engleterre come piert de record en le dit Parlement adjuggerent & declarerent ceſt Article conuz per le dit Erce-veſque pur Traiſon, & le dit Erce-veſque pur Traitour, & ſur ce eſt agarde quil ſoit banni & ſes Tem-poralitees ſeiſis en main le Roy, *Whereupon our ſaid Lord the King, and all the Temporal Lords, and Sir* Thomas le Percy *being ſufficiently empowered from the Prelates and Clergy of the Kingdom of* England *as appears upon Record in Parliament, judged and declared this Article acknowledged by the ſaid Archbiſhop to be Treaſon, and the ſaid Archbiſhop to be a Traitor, and thereupon awarded*

awarded him to be baniſhed and his Temporalties to be ſeiſed into the Kings hands. Here the Biſhops were not preſent in perſon, but Sir *Thomas le Percy*, as their Procurator and Proctor authoriſed by them, may be ſaid to repreſent them; and ſo he did, but yet it ſhews that the Biſhops as Biſhops and Clergy men could not be there in their perſons, and that rather than they ſhould be there preſent ſuch an unuſual thing ſhould be admitted, as that one Layman, who elſe was no Peer nor had place in the Houſe of Peers to vote there, ſhould be choſen by them, to have all their Proxies put together and united in him; to be diſpoſed of by him as he ſhould think good. For it was never done, but in this one Parliament, there never was in no Parliament before or after ſuch a Procuratorſhip or Proxy given. And in this Parliament of 21. *R.* 2. it was thrice done, firſt here to Sir *Thomas Percy*, then the Parliament being adjourned to *Shrewsbury*, it was there given, it ſeems by vote only, to *William*

am

am le Scrope Earl of *Wilts*, for the words are 'Sur ce les ditz Prelatz & Clergie nomerent & ordenerent en Parlement per bouche William le Scrope Conte de Wilts, commettant & donant a luy pleine poair auſſi avant & en manere come feuſt comys a Mr. Thomas le Percy per devant, *Hereupon the ſaid Prelates and Clergy named and appointed in Parliament by word of mouth* William le Scrope *Earl of* Wilts, *and gave him the ſame power, as full and in the ſame manner, as before had been granted unto Sir* Thomas le Percy. Now, *Percy* had it by Commiſſion enrolled; which happily was to make it more authentick, becauſe he was but a Commoner. The third time it was done, was in the buſineſs between the two Dukes of *Hereford* and *Norfolk*, when by this Parliament ſitting then at *Shrewsbury*, that whole matter was referred to the King, to be by him determined by the advice of certain Lords and Commoners there named, and to them were joyned the Earls of *Worceſter* and *Wilts* Procura-

tors

tors for the Clergy. This I muſt ſay argues a great unanimity in the voting of the Prelates, which it ſeems hath ever been, but I muſt ſay it was moſt Unparliamentary, never practiſed, but in that one Parliament of the 21. *R.* 2. which whole Parliament is repealed, and all it did Nulled, and made Void by Act of Parliament 1. *H.* 4. ſo as it cannot be urged as a Precedent to infer any thing upon it, nor can it make any thing to prove a right in the Biſhops of being perſonally preſent in matters of that nature, but rather in my opinion ſtrongly the contrary: And one thing more would be obſerved, which is, that it ſeems by the Record, that the whole Clergy of *England* joyned in making this Proctor, and not only the Prelates, who were Members of the Houſe of Peers, which ſeems very ſtrange. But more than all this, whatever was done this Parliament ſignifies nothing, the whole Parliament ſtands repealed by 1. *H.* 4. and all done in it declared Null and Void.

1. *H.* 4. The Commons had deſired that

that Sir *William Rikhill*, (who had been a Judge in the *Common Pleas*, and had been ſent by *R.* 2. to *Calais* to take the Confeſſion of the Duke of *Gloceſter*, who ſoon after was there murthered) might be put to anſwer upon what account he did it: He was under arreſt for it; and was brought into Parliament before the King and the two Houſes, the Lords Spiritual and Temporal, and the Commons then aſſembled together: The whole matter was examined, the concluſion was, ſaith the Record, **Sur ceo chaſcun Sr. Temporel eſteant en plein Parlement examine ſeveralment ſur la reſponſe du dit** William, **dit quil avoit fait loyalment & quil ny avoit en luy aucun coupe**, *Hereupon every Lord Temporal being in full Parliament ſeverally asked concerning the anſwer of the ſaid* William, *ſaid he had carried himſelf Loyally, and that he had committed no fault.* There was no charge, no impeachment againſt him, ſo the Biſhops might be, and were preſent at his examination, as the Commons alſo were,

but

but they muſt have no hand in giving any Judgment upon it, becauſe it might have been a preparatory to an Accuſation and an Impeachment, if he had not given ſo good ſatisfaction, as it ſeems he did in the account he gave of his employment.

That Parliament *John Hall* a Servant of the Duke of *Norfolk's*, who had helped to murther the Duke of *Gloceſter* at *Calais* was tried before the King and the Lords Temporal: The Record ſaith, **Il ſembla au Roy & a toutz les Srs. Tempozels quil avoit deſervi davoir ſi dure mozt come la Ley luy pourroit donner, Et ſur ceo toutz les Srs. Tempozelz per aſſent du Roy adjuggerent quil ſeroit treinez del** Tower-hill **juſques a les fourkes de** Tyburn,&c. *It ſeemed to the King and to all the Temporal Lords that he deſerved as cruel a death as the Law could inflict: And hereupon all the Temporal Lords with the aſſent of the King gave Judgment that he ſhould be drawn from* Tower-hill *to the Gallows at* Tyburn,&c. *there to be hanged*,&c.

2. *H.* 4.

2 *H* 4. The firſt Writ *de Hæretico comburendo* was agreed upon only by the Lords Temporal, it was in the Caſe of *William Sautre*, (our St. *Stephen*, the Protomartyr of *England*,) the Record is, **Item teſt Veſquerdy un Brief fuſt fait as Veir & Viſcountz de** Londres **per advis des Srs. Temporelx en Parlement de faire execution de** William Sautre, *Item this Wedneſday a Writ was framed, by the advice of the Lords Temporal in Parliament, directed to the Mayor and Sheriffs of* London *for the execution of* William Sautre. I doubt not but the Biſhops and Clergy of thoſe times were the chief promoters of this, though not appearing to be Actors in it: Which yet would not have been a direct condemnation of him, as his Judges, nor any thing to be determined by them tending to his conviction, but only an advice given to the King to make it his Act under the Broad Seal to order his execution; yet they then were not to have a hand even in a matter of this nature.

The ſame Parliament the Earls of *Kent*, *Huntington*, and *Saliſbury*, the Lord *le Deſpencer*, and Sir *Ralph Lumley*, who for levying War againſt the King had been taken and executed, were by the Lords Temporal declared and adjudged Traitors, and their Eſtates to be forfeited, the names of the Lords that made this Declaration, and gave this Judgment are there ſet down, the Prince of *Wales* the firſt, and the Lord *le Scroope* the laſt, five and twenty in all; Not a Biſhop amongſt them, ſo much as to declare and judge it a Treaſon, though the perſons who had committed it were dead before: So as it ſeems they muſt not have a hand neither in the Antecedent, what is Preliminary and Preparatory to the death of a Man, nor in the Conſequent, what is to be done after, ſo far from being the Judges to try or condemn him.

5. *H.* 4. The Earl of *Northumberland* had Petitioned the King for his Pardon for having, contrary to his Allegiance, gathered Forces, and given Liveries: The King gave this Petition

on to the Judges, to have their opinion of it; the Lords Proteſted againſt it, and ſaid, that the Judgment belonged to them, and retained the buſineſs, Et puis leve & entendue la Petition les Srs. come Piers du Parlement, a queux tielz Jugement apperteinnent de droit, adjuggerent, que ceo que fuſt fait per le Conte neſtoit pas trahiſon mes treſpas tant ſeulement. Sur quoy le dit Conte molt humblement remercia le Roy & les ditz Srs. ſes Piers de lour droiturel Jugement, *And then the Petition being read and underſtood, the Lords as Peers of Parliament, to whom ſuch Judgments do of right appertain, did give their Judgment, that what the Earl had done, was no Treaſon, but only a Treſpaſs, whereupon the ſaid Earl did moſt humbly thank the King and the ſaid Lords his Peers for their righteous Judgment.* Now the Biſhops could not be ſaid to be his Peers, which ſhews they were not there.

7 *H.* 4. A Judgment was given much like to that in the 2 *H.* 4. The King commanded the Lords Temporal to deliver their advice concerning the Earl of *Northumberland* and the Lord *Bardolph*, who had been killed at *Bramham More* in *Yorkſhire* by the Sheriff of the County, who there with the *Poſſe Comitatus* encountred them in the field; There were proceedings againſt them in the Court of Chivalry after their deaths, upon certain Articles of Treaſon there exhibited againſt them. Theſe Articles were brought into Parliament, upon reading of which thoſe Lords Temporal adjudged their Crime to be Treaſon.

5 *H.* 5. The Commons, **Baillerent une Petition,** delivered a Petition, directed **al honorable Prince le Duc de** Bedford **Gardein d' Engleterre, & as tres ſages Srs. de ceſt preſent Parlement,** *To the honourable Prince the Duke of* Bedford *Gardian of* England, *and to the moſt wiſe Lords of this preſent Parliament*, that Sir *John Oldcaſtle* might be brought before them, who

who was indicted and outlawed in the Kings Bench for Treaſon, and excommunicated by the Archbiſhop of *Canterbury* for Hereſie; and that due execution might be done upon him according to their diſcretion by authority of Parliament. **Pur quoy agarde eſt per les Srs. avant ditz del aſſent de le dit Gardein & a la priere ſuſdit, que le dit** John **come Traitor au Roy & a ſon Royalme ſoit ameſnez a la Tour de Londres & dilloeques ſoit treinez parmi la cite de Londres as novelles Fourches en la paroche de St.** *Giles* **& illoeques ſoit penduz & ars pendant,** *Wherefore it is adjudged by the Lords aforeſaid, with the aſſent of the ſaid Gardian upon the foreſaid Requeſt, that the ſaid* John, *as a Traitor to the King and his Realm, be carried to the Tower of* London, *and thence drawn through the City of* London *to the new Gallows in St.* Giles *Pariſh, and there to be hanged, and burnt hanging.* The queſtion is now, if it ſhall be underſtood, that under the general expreſſion of **Les Srs. de ceſt**

present Parlement the Bishops were comprized; and so to have been parties in this Judgment, and I conceive not, first, because I observe that generally throughout all the Records and Journals of Parliament almost in all transactions, but especially and constantly I find it so in matters of Judicature, where they were present, it is always mentioned and expressed so, as *That the Lords Spiritual and Temporal*, or *That the Prelats, and Earls, and Barons* did so and so, as it was in the Cases before mentioned of Sir *John Lee*, *Richard Lyons*, the Lord *Latimer*, and the rest, accused of misdemeanours; And my other reason is, that in this particular Case of Sir *John Oldcastle* I find the Clergy had done their parts with him before, declaring him an Heretick, and turning him over to the Secular power, as the words of the Excommunication run, where after having expressed a great tenderness of the desperate condition of his Soul, and much bewailed his obdurateness, they do condemn him for a Heretick,

Relinquen-

Relinquentes eum ex nunc tanquam Hereticum Judicio Seculari, *Leaving him from thence forward as an Heretick to the Secular Judgment.* So certainly thoſe good men, I mean thoſe Popiſh Biſhops, would have no more to do with him as to his farther Execution, that the world might ſee they were not Men of bloud.

2. *H.* 6. Sir *John Mortimer* had been committed to the Tower upon ſuſpicion of Treaſon againſt *Henry* the Fifth, and made an eſcape out of priſon, being taken again he was indicted of Treaſon at *Guild-Hall:* The Indictment by the Kings command was returned into Chancery, then brought into Parliament by the Biſhop of *Durham* Lord Chancellour, and by him, *Coram Humfrido Duce Glouceſtriæ* (who in the Kings abſence was commiſſionated to call and hold that Parliament) *ac aliis Dominis Temporalibus in eodem Parliamento tunc exiſtentibus fuit liberatum, Was delivered to* Humfry *Duke of* Gloceſter, *and other the Lords Temporal being then in*

Parliament to be by them affirmed, as it was, and Sir *John Mortimer* then brought before them, and adjudged by them to be drawn, hanged, and quartered: **Et ſuper hoc viſo & plenius intellecto Indictamento per dictum Ducem de aviſamento dictorum Dominorum Temporalium, ac ad requiſitionem totius Communitatis in preſenti Parliamento exiſtentium auctoritate iſtius Parliamenti ordinatum eſt & ſtatutum,** &c. **quod ipſe uſque ad Turrim ducatur,** &c. *And hereupon the ſaid Indictment being ſeen and well underſtood, it was by the ſaid Duke, by the advice of the ſaid Lords Temporal, at the prayer of the whole Commonalty in this preſent Parliament, and by the Authority thereof Ordered and Decreed,* &c. *that he ſhould be led to the Tower, and from thence drawn to* Tyburn, *and there executed.* We ſee here the Biſhops did not offer to adviſe ſo much as concerning the Indictment, if it ſhould be admitted of and received by the Parliament, though a Biſhop, being Lord Chan-

Chancellor was by vertue of his Office to bring it out of the Chancery, and preſent it to the Houſe, as he did, and there left it.

28 *H.* 6. is the ſole ſingle Preſident of Biſhops being preſent, and not only ſo, but acting and bearing a principal part in a Judicial proceeding in Parliament in a Caſe that was in it ſelf Capital, though ſtrangely ſhuffled off, and Juſtice wholly eluded.

January 22. *William de la Pole* Duke of *Suffolk* preferred a Petition to the King, complaining *how he was defamed, as if he were other than a true man to the King and the Realm*, and deſiring that any man would ſay wherein, that he might give his Anſwer thereunto. *Munday* 26, the Commons ſent ſome of their Fellows to the Chancellour, who was Archbiſhop of *York* and a Cardinal, praying him, that whereas the Duke of *Suffolk* had that ſame day in his own declaration confeſſed, *that there was a very heavy rumour and noiſe of infamy upon him*, he would let the King know it, that he might be committed

committed to ward *after the course of Law in eschewing of inconveniencies that may sue thereupon hereafter* (they are the words of the Record.) The next day *Tuesday*, the Chancellour acquainted the King and the Lords with it, and asked the Lords what should be done upon the Commons request. The Judges were asked what the Law was in this matter; the Chief Justice answered for the rest, that in these general Terms of Slander and Infamy many things may be understood which deserve not imprisonment, but he desired more time to consider of it with his Fellows: The Lords staid not for their return, but all of them from the lowest to the highest were of one opinioa, that he should not be committed to ward till the Specialty of the matter were declared. *Wednesday* the 28. the Chancellour and other Lords were sent down by the Kings commandment to the House of Commons, and the Speaker declared unto them, That seeing special matter was required, they had daily information from several

veral parts of *England*, that the Realm was ſold to the Kings Adverſary of *France* by the Duke of *Suffolk*, and that he had fortified *Wallingford* Caſtle to be a place of refuge unto them, and this the Commons do think is ſpecial matter of ſuſpicion of Treaſon laid to his charge, for which he ought to be committed, and therefore it was the deſire of the Commons that he might be ſo, upon which deſire he was ſent to the Tower. The ſeventh of *February* the Chancellour again and ſeveral Lords both Spiritual and Temporal were by the Kings command ſent again to the Houſe of Commons, and the Speaker *William Treſham* gave them a Bill containing ſeveral Articles of High Treaſon againſt the ſaid Duke, which Bill he in their names deſired, **At in preſenti Parliamento inactitaretur,** *to be inrolled in Parliament*, and the Duke upon it to be proceeded againſt. The twelfth of *February* this Bill was read in the Houſe of Lords, and it was thought fit by all the Lords, that the Juſtices ſhould have a Copy of it,

and

and report their advice what ſhould be done, but the King would have it reſpited, till he was otherwiſe adviſed. The ſeventh of *March* next following it was thought fit by the moſt part of the Lords, that the Duke ſhould then come to his Anſwer. The ninth of *March* the Lords were again ſent down to the Commons at their requeſt, and another Bill was delivered to them containing certain Articles of miſpriſions and horrible offences committed by the Duke, which they deſired might be *Enacted in this High Court of Parliament*, (ſo is the expreſſion) and he to be proceeded againſt. The ſame day the Duke of *Suffolk* was brought from the Tower, by vertue of the Kings Writ, into the preſence of the King and the Lords Spiritual and Temporal in the Parliament Chamber, both the Bills of the Articles were read unto him, of which he deſired Copies; which was granted: and to be nearer at hand to give in his Anſwer, and come to his Trial, the King by the advice of the Lords committed him to the

the ward of three perſons, Eſquires, to be kept in a Tower within the Kings Palace of *Weſtminſter*. The thirteenth of *March* he was ſent for to come before the King and the Lords Spiritual and Temporal, to anſwer to his Charge, which he did, denying all of Treaſon laid unto him, and excuſing the reſt. The fourteenth the Chief Juſtice rehearſed to the Lords by the Kings commandment, what had paſſed the day before, and asked them what advice they would give, which they put off till *Munday* the ſixteenth, and that day nothing was done. Then *Tueſday* the ſeventeenth the King ſent for all the Lords Spiritual and Temporal, who were in Town, into his *inneſt Chamber with a Gabel Window over a Cloyſter* within the Palace of *Weſtminſter*: The Lords are all named, *viz.* the two Archbiſhops, the Duke of *Buckingham*, thirteen Biſhops, ſix Earls, two Viſcounts, two Abbots, the Prior of St. *John*, and nineteen Barons, who being aſſembled, the King ſent for the Duke of *Suffolk*, who came, and was upon

upon his knees all the time the Chancellour ſpake unto him, who by the Kings commandment remembred what paſſed at his Trial, and particularly, that he had not then put himſelf upon his Peerage, and asked him now what he had more to ſay. The Duke ſaid, that, not departing from his Anſwers and Declarations, he did wholly ſubmit himſelf to the Kings rule and governance to do with him as he liſt. Whereupon the Chancellour (who, as I ſaid before, was Archbiſhop of *York*, and a Cardinal) by the Kings commandment ſaid unto him, *Sir, I conceive that you, not departing from your Anſwers and Declarations in the matters aforeſaid, not putting you upon your Peerage ſubmit you wholly to the Kings rule and governance, wherefore the King commandeth me to ſay to you, that as touching the great and horrible things in the firſt Bill compriſed, the King holdeth you neither declared nor charged; And as touching the ſecond Bill touching miſpriſions, which be not Criminal, the King by force of your ſubmiſſion, by his own advice,*

advice, and not reporting him to the advice of his Lords, nor by way of Judgment, for he is not in place of Judgment, putteth you to his rule and governance, that is to ſay, that you before the firſt of May *ſhall abſent your ſelf out of the Realm of* England *unto the end of five years, but you may abide in the Realm of* France, *or in any other Lordſhips or places being under his obeiſſance, and you ſhall not bear malice to any man for any thing done to you in this Parliamont.* And forthwith the Viſcount *Beaument* on the behalf of the ſaid Lords Spiritual and Temporal, and by their advice, aſſent, and deſire, recited, ſaid, and declared to the Kings Highneſs, *That this that was ſo decreed and done by his Excellency concerning the perſon of the ſaid Duke, proceeded not by their advice and counſel, but was done by the Kings own demeanance and rule, therefore they beſought the King that this their Saying might be enacted in the Parliament Roll, for their more declaration hereafter, with this Proteſtation that it ſhould not be, nor turn in prejudice nor*

derogation

derogation of them, their Heirs, ne of their Succeſſors in time coming, but that they may have and enjoy their Liberties and Freedom as largely as ever their Anceſtors or Predeceſſors had and enjoyed before this time.

I have been the more large in this account, which I have given of this Trial, marking out every ſtep of the proceedings in it, that whoſoever reads it may ſee how irregular and extravagant it was from the beginning to the end, from the Commons firſt deſiring that the Duke of *Suffolk* ſhould be committed upon ſo ſleight a ground as his complaining in the Houſe of Lords, that he was ill ſpoken of, and defamed, to the cloſe of all, the Judgment given by the King by the mouth of the Chancellour for his baniſhment, in regard he had not put himſelf upon his Peerage, which yet the Chancellour ſaid the King did not do as his Judge, for that he was not in the place of Judgment. And it was an odd thing and unuſual, that ſome Prelates and ſome Lords ſhould be ſent down

to

to the Houſe of Commons to receive the Articles of this Impeachment. All this was ſuch a Hodge-podge of a Trial, as no man can tell what to make of it, nor can it be of any ſignification to be a preſident and a rule of proceeding in matters of that nature in Parliament.

But admit it had been never ſo regular, it is but one ſingle preſident of Biſhops and Prelates acting in a Judicial capacity in a Capital cauſe in Parliament, againſt multitudes excluding them; it was once ſo, and never but once: And can that be thought ſufficient to alter and change the conſtant courſe and practice of Parliaments, which hath been otherwiſe? Had it been queſtioned then, and upon a debate and mature conſideration, been ſo reſolved at that time, this had ſignified ſomething: but it was done and no exception taken, which they call a paſſing *Sub ſilentio*, and more, it was never done but once. But Sir *Edward Coke* goes further, and ſaith, that two or three preſidents are nothing, if forty be contrary, and it is ſo here; he tells

you too, when it is that they ſignifie nothing; that is, **Quand les Preſidents paſſe ſans challenge del partie ou debate des Juſtices**, *When they be not challenged by the party concerned, or not conſidered of, and debated by the Judges*, as neither of them was here done, it is in *Slades* caſe in the 4. Reports. It is a rule in Law, *A facto ad jus non valet argumentum*, but it may withal be ſaid, and truly, *A ſæpe facto ad jus contra ſemel factum valet argumentum.* Upon the whole matter, one may boldly affirm, that this Preſident of 28 *H.6.* is no ground for the Biſhops to build their claim upon, of having a right to ſit and vote in Parliament in Capital Cauſes.

31 *H. 6.* is the Earl of *Devonſhire*'s Caſe, the Record runs thus. *Be hit remembred that where the* 14. *day of* March *the ſaid* 31 *year of this preſent Parliament*, Thomas *Earl of* Devonſhire *upon an Indictment of High Treaſon, by him ſuppoſed to be done againſt the Kings honourable eſtate and perſon, afore* Humfrey *Duke of* Bucks, *Steward of* England *for*

that

that time aſſigned, and of the ſame Treaſon by his Peers the noble Lords of this Royaume of England *being in this ſaid preſent Parliament, was acquitted of all things contained in the ſame Indictment.* Now I ſuppoſe no man will ſay, That the Biſhops were either his Peers, or Lords of the Realm.

38 *H.* 6. The Lord *Stanley* was accuſed by the Commons for being in confederacy with the Duke of *York*, and they deſire he may be committed to priſon; the Anſwer is, The King will be adviſed; which is all was done: And this is the laſt preſident of any Impeachment, or of any perſon queſtioned in Parliament in a Judicial way, that is upon the Rolls in the Tower.

And I do not remember that I have read or heard of any Trial in Parliament in a Judicial way ſince that time till the E. of *Straffords* in our memory, whoſe Trial was compleated in that way, but he was attainted and condemned by the Legiſlative power; During all the Trial, from the beginning to the end, the Biſhops were never pre-

ſent at any part of it: And it yet appears upon the Journal Book of the Houſe of Peers, though many paſſages be razed, but this is not, *That upon the* 9. *of* March 1640. *upon a Report brought in by the Lord Privy Seal of ſomething concerning that buſineſs, and a debate ariſing upon it, the Biſhops withdrew, it being* In agitatione cauſe ſanguinis.

It is true, there was in that ſame Parliament the *February* before an Impeachment of High Treaſon brought up from the Houſe of Commons againſt the Lord Keeper *Finch*, but it never came to Trial, for he fairly ran away, and got beyond Sea, whereupon by the Order of the Lords Temporal, a Proclamation was iſſued forth for him to appear the 10. of *March* following: the words of the Proclamation are, Rex Vice-comiti, &c. Cum Communitas Regni noſtri Anglie in preſenti Parliament. Johannem Dominum Finch de Fordich nuper Cuſtodem Magni Sigilli Anglie de Alta Proditione accuſaverit & impe-

impetierit, Cumque per Dominos Temporales in eodem Parliamento de assensu & advisamento nostris Ordinatum extitit, quod Proclamatio per totum regnum nostrum Anglie publice fiat, qd. idem Johannes Dominus Finch in propria persona sua compareat, & se reddat coram nobis & prefatis Dominis, decimo die Martii proxime futuro ad respondendum & standum recto coram nobis & prefatis Dominis et hoc parte: Nos volentes, &c. *The King to the Sheriff, &c. Whereas our Commons of this our Kingdom of* England *have in this Parliament accused and impeached* John *Lord* Finch *of* Fordich, *late Lord Keeper of the Great Seal of* England, *of High Treason, And whereas the Lords Temporal have in the same Parliament with our consent and advice Ordered a Proclamation to be published throughout our whole Kingdom of* England, *that* John *Lord* Finch *do personally appear and yield up himself to us and the foresaid Lords, upon the* 10. *of* March *next following, to answer for his*

Treaſon, and ſtand to the Judgment of us, and the foreſaid Lords in that behalf; We willing that the Order have its due effect, do command and ſtrictly enjoyn you, that upon the receipt of theſe preſents, you do in all Cities, Market Towns, and ſuch other places within your Bayliwick, as to you ſhall ſeem expedient, cauſe in our name to be publickly proclaimed, That John *Lord* Finch *do appear in perſon and render himſelf before us, and the foreſaid Lords in this preſent Parliament, upon the* 10. *of* March *aforeſaid, to anſwer for the Treaſon aforeſaid, and ſtand to the Judgment of us and the foreſaid Lords in that behalf, according to the tenor of the foreſaid Order.* This was the Proclamation, Ordered to be made onely by the Temporal Lords, and no Biſhops preſent, yet was it no part of the Trial, but meerly a courſe taken to have him in Court, that he might be tried. But becauſe it looked towards a Trial, the Biſhops muſt have no hand in it.

And it is further obſervable in this preſident, that the Kings learned Coun-

ſel

ſel was ordered to draw up this Proclamation according to the antient Parliamentary way, which ſhews that it was the ancient Parliamentary way, That only the Lords Temporal ſhould be intereſted in ſuch Proceedings, and have the ordering of them, and not at all the Biſhops.

And I can give you an ancient Preſident out of the *Placita Parliamentaria* in the 33 of *Ed.* 1. *Nicolas de Segrave* being with the King in an Expedition into *Scotland*, had a quarrel with *John de Crumbwell*, left the Kings Army, and went to fight with *Crumbwell* in *France:* He was for this by the Kings command at his return ſummoned to appear in Parliament, which he did, **Venit in pleno Parliamento in preſentia ipſius Domini Regis, Archiepiſcopi Cantuarienſis & plurimorum Epiſcoporum, Comitum, Baronum & aliorum de Conſilio Domini Regis tunc ibidem exiſtentium,** *He came into the Parliament before the King, the Archbiſhop of* Canterbury, *and many other Biſhops,*

Earls, Barons, and others of the Kings Counſel there preſent. The buſineſs is opened before them by *Nicolas de Warwick*, who charged him with leaving the King amongſt his Enemies, and doing what in him lay to expoſe him unto their power; whether the Biſhops continued in Parliament to hear this, appears not by the Record, but it appears clearly, that they were not to meddle in it, not ſo much as to adviſe upon it; for it follows, Et ſuper hoc Dominus Rex volens habere aviſamentum Comitum, Baronum, Magnatum & aliorum de Conſilio ſuo, injunxit eiſdem in homagio, fidelitate & ligiancia quibus ei tenentur, quod ipſum fideliter conſulerent qualis poena, pro tali facto ſic cognito fuerit infligenda. Qui omnes habito ſuper hoc diligenti tractatu & aviſamento conſideratis & intellectis omnibus in dicto facto contentis, & per predictum Nicolaum plene & expreſſe cognitis dicunt, Quod hujuſmodi meretur penam amiſſionis vite,

The

The King willing to have the advice of the Earls, Barons, and other great men of his Counſel, injoyned them upon the Homage, Fidelity, and Allegeance which they owe him, to give him faithful Counſel, what puniſhment was to be inflicted upon ſuch a crime ſo confeſſed, who all upon a ſerious debate and adviſing upon the matter, and well weighing all the particulars of it, and what was by the ſaid Nicolas *expreſly acknowledged, do ſay, That ſuch a man deſerved to loſe his life,* but the King pardoned him afterwards. Still you ſee Biſhops are not ſo much as adviſed withal in a Caſe of Life and Death.

This we ſee hath been the uſage in Parliament all along, ſince the Journals and Records can give us any light of what was there done. And out of Hiſtory I can go further, and cite you an ancienter Preſident than all theſe: In *Edward* the Confeſſors time, who in a Parliament convened in *London*, as *Brampton* relates it in his Chronicle, *Col.* 937. upon Earl *Godwin's* appearing there, who was ſaid to have formerly

merly murthered *Alfred* the Kings Brother, presently cried out, Proditor Godwine ego te appello de morte Alfredi fratris mei, quem proditionaliter occidisti, cui Godwinus se excusando respondit, Domine mi Rex salva reverentia & gratia vestra, pace & dominatione, fratrem vestrum nunquam prodidi nec occidi, unde super hoc pono me in consideratione Curie vestre. Tunc dixit Rex, Carissimi Domini Comites & Barones terre qui estis homines mei legii hic congregati, & appellum meum responsumque Godwini audistis, volo quod inter nos rectum judicium decernatis, & debitam justiciam faciatis. Comitibus vero & Baronibus super hoc ad invicem tractantibus, &c. *Thou Traitor* Godwin, *I do accuse thee of the death of my Brother* Alfred, *whom thou didst treacherously kill*; *whom* Godwin *answered, excusing himself, My King, with reverence to your* Grace, *and to your Government, and with your good leave I have not used treachery to your Brother, nor*

nor have I killed him, and of this I refer my ſelf to the Judgment of your Court. Then the King ſaid, Dear Lords, Earls, and Barons of the Land, who are my Liege People here aſſembled, you have heard my Appeal, and Godwins *Anſwer, I will have you to decree righteous Judgment betwixt us, and to do that Juſtice which ought to be done. And the Earls and Barons debating this among themſelves,* ſome were of one opinion, ſome of another, and at laſt they agreed to offer the King a great ſum of money, and to beſeech him that he would take off his diſpleaſure from Earl *Godwin*, and pardon him. The Hiſtorian adds, **Quorum conſiderationi Rex contradicere nolens, quicquid judicaverant per omnia ratificavit,** *Whoſe opinion the King not willing to contradict, agreed to, and ratified all that they had done.* Here we ſee it was only *Ad Comites & Barones* that he appealed, and they were only to Judge of it, and no Biſhops nor Prelates.

But ſome I hear alledge a Preſident in 11 *H.* 2. of Archbiſhop *Becket*, who was

was at a great Council *Solemne Consilium* at *Northampton* accuſed of Treaſon, and other miſdemeanors, where Biſhops were his Judges, as well as Temporal Lords. This they fetch out of Mr. *Seldens* Titles of Honour, who cites for it a Manuſcript made by a Monk, called *Stephanides*, or *Fitz-Stephen*, and there it is ſaid, that the Archbiſhop was accuſed **Lese Majestatis Regie Coram, quia est a Rege citatus in causa** Johannis **neque venerat, neque idonee se excusaret,** *Accuſed of Treaſon becauſe being ſummoned by the King in the Cauſe of one* John le Mareſchal, *and he neither came himſelf, nor ſent a ſufficient excuſe,* and that for it he was ſentenced to forfeit all his Movables, and that the Lords and the Biſhops could not agree upon pronouncing the Judgment, they putting it off from one to the other, and that at laſt the King commanded the Biſhop of *Wincheſter* to do it: This is what that Manuſcript ſaith. But none of the ancient Hiſtorians of thoſe times ſay any thing of his being accuſed of

Treaſon

Treaſon. And which makes it the more unlikely, is, that it was ſoon after that ſolemn ratification of the Conſtitutions of *Clarendon*, which all both Biſhops and Lords, had ſworn to obſerve for ever, declaring them then to be the Law of the Land, and to be **Conſuetudines & Libertates anteceſſorum ſuorum**, *The Cuſtoms and Priviledges of their Anceſtors*, (which makes me ſay, it was rather a Declaring what was the Law before, than making a new Law; though what was then done, was ſufficient to make it a Law, if it had not been ſo before:) And one of theſe Conſtitutions was, that the Prelates of the Church ſhould not **Intereſſe judiciis Curie Regis**, *Be preſent at the Judgments given in the Kings Courts*, when loſs of Members or Life was in queſtion. This great Council or Parliament was in *February* at *Clarendon*, and the other at *Northampton* was in *October* following; ſo it is not likely they ſhould ſo ſoon forget, and do contrary to what they had bound themſelves to ſo lately by

a ſolemn Oath publickly in open Parliament: And I think one may modeſtly affirm, that it was a miſtake in the Writer of that Manuſcript to ſay, that the Archbiſhop was then charged with Treaſon: *Gervaſius Dorobernenſis* ſaith, he was charged with two things; one, not doing Juſtice in his Eccleſiaſtical Court to one *John*, (who was *John* the *Mareſchal*, that complained of the Archbiſhops detaining ſome Land from him;) the other, that being ſent for by the King upon occaſion of *Mareſchals* complaint, he came not: The firſt he excuſed, laying the fault upon *Mareſchal* himſelf for abuſing the Court; bringing **veterum cantuum codicillum,** *and old Song-Book*, to ſwear upon, and refuſing to ſwear **ſuper Evangelium, ut moris eſt,** *upon the Evangeliſts, as the Cuſtom is*, whereby he ſaid he did **Curiam ſuam infamare,** *Defame his Court.* The other he anſwered, proving by two ſufficient Witneſſes, *Per duos legales viros*, that it was ſickneſs hindred him, and not any contempt. This is the account

account which *Gervaſius* gives, and ſaith not a word of any Treaſon; neither doth *Matthew Paris*, nor *Roger Hoveden*, who both of them give a relation of that proceeding at *Northampton* againſt the Archbiſhop. And to ſay the truth, it would be a ſtrange High Treaſon, only not to come being ſent for by the King, though there had been no ſickneſs in the caſe, at moſt it could have been but a High Contempt, and puniſhable by Fine and Impriſonment, or the like; and probable it is, that *Fitz-Stephen*, who was a Creature of the Archbiſhops, might repreſent it ſo, only to draw more *Odium* upon the King for his ſeverity againſt the Biſhop, even to an injuſtice, when in truth there was no ſuch thing. However we may look upon it, as but a weak Preſident for the Biſhops to lay any weight upon to prove their right to ſit, and vote, and judge in a Capital cauſe, *Cauſa ſanguinis*, being at the beſt but out of a blind Manuſcript of an Author juſtly ſuſpected of great partiality, againſt the

tenour

tenour of all the ancient Writers that give an account of the ſame buſineſs.

But we muſt go a ſtep further to clear this matter in queſtion, for it ſeems ſome of the Biſhops do ſay, that though they will have no part in the Condemnation and pronouncing Judgment upon a Criminal perſon, as to loſs of Life or Member, yet they may and will vote and Judge in ſuch things as are but Preliminary and Preparatory to that condemnation, and yet think they have no hand in bloud, though they have a hand in doing that, which will infallibly cauſe the taking away of of a mans Life, and ſhedding of his Blood, ſo they would divide two things which in truth have ſo near a relation and dependency the one upon the other, as they are only ſeparated by a little time coming between; one thing to be done firſt, and that being done, the other muſt neceſſarily follow, and be done preſently after: And they doing the former, may be well ſaid to do the latter; and if any

Law

Law prohibit them from having to do with the latter, the ſame Law doth and muſt prohibit them medling with the former. It is a rule in Logick, *Cauſa cauſæ eſt cauſa cauſati.* If the Judgments of the Biſhops determine one thing, which is the neceſſary cauſe of any other thing, their Judgment may be ſaid, and really it doth determine the other thing.

As take for example the particular caſe upon which this Queſtion hath been moved, the Earl of *Danbyes* Pardon, of the validity or invalidity whereof they will be Judges: It is hoped they will be juſt Judges, and incline neither way, but according to the merits of the Cauſe before them, ſo what their Judgment will be till they have heard all, themſelves cannot tell. Now, if by their Judgment the Pardon be determined to be invalid and illegal, and that carry with it a conviction of the Crime of which he ſtands impeached (as ſome will have it to do, ſaying, that the taking of a Pardon implies a guilt, and is in Law a

confeſſion of the Crime pardoned) and ſo his condemnation muſt neceſſarily follow even for Treaſon, the impeachment being ſo, doth not their Judgment ſubject him to that condemnation? How then can they ſay, we will have no part in condemning him? Is not this ſomething like the Frier in *Chaucer*, that would have, *of a Capon the Liver, of a Pig the Head, yet would that nothing for him ſhould be dead:* So they forſooth will take upon them to Judge his Pardon to be no Pardon, which brings on infallibly his condemnation, and yet ſay with that Frier, God forbid he ſhould die for us, That we ſhould have any hand in his bloud: But certainly this will not paſs for currant either in *Foro Judicii*, or *Foro Conſcientiæ*, to excuſe them from being Actors in his Condemnation.

To evade this, ſome ſay the Biſhops may be preſent, and hear what will be ſaid *Pro* and *Con* concerning this Pardon, and thoſe only ſhall deliver their opinions and judgments of it, who are ſatisfied of the Validity and Legality

of

of it, but thoſe amongſt them who are of another mind, ſhall withdraw and give no vote, and then it cannot be ſaid that any of them have a hand in condemning him. But how this will ſute with the Office of a Judge let any man judge, whoſe duty it is to condemn the Guilty, as well as to acquit the Innocent, and who ought to do the one or the other in every buſineſs that comes before him, as he finds ground for it upon hearing the Allegations, and Proofs: And beſides, it is moſt Unparliamentary, for in Parliament all who are at the debate of a buſineſs, ought to give their vote to the Queſtion one way or other, according to their ſenſe of it, and as they in their Conſciences think it juſt.

But to break thorough all at once they will have it, That it is only by the Canon Law that this reſtraint is upon them, and that the forbearance of their Predeceſſors being Papiſts, and ſo ſubject to that Law, was only in that reſpect; which Law being of

no force at preſent, and taken away by Act of Parliament, they are now at Liberty, though in modeſty they think fit ſometimes to withdraw, but have a right to continue ſitting, if they pleaſe.

To which in anſwer I ſhall ſay, that I will not deny but that the Canon Law might give the firſt riſe, and a beginning to ſuch an uſage, and no Law could be of greater force to introduce and eſtabliſh ſuch a thing, as being that to which only the Clergy of thoſe times would be ſubject, conceiving themſelves to be above, and not bound by any other: But it is moſt clear, that it came afterwards to receive a Civil Sanction, and to have not only the ſtamp of the Authority of Parliament ſet upon it by the continual practice there, and we know that **Conſuetudo Parliamenti eſt Lex Parliamenti**, *The Cuſtom of Parliament is the Law of Parliament:* But that two ſeveral times there have been particular and expreſs Confirmations, and Ratifications of it in Parliament, which makes it

it a Statute Law of the Land, as much as any other can be, which we have in our printed Statute Books.

The first time was at a Great Council, which was then their Parliament, at *Clarendon* about the 10 of *H.* 2. where were made that which they call the *Constitutions of Clarendon*, which were not new things then first made, but a recapitulation of some things that had been in use and practice in former tim s. *Matthew Paris* and *Gervasius Dorobornensis* recite them at large, other ancient Historians more succinctly: There were of them sixteen in number: *Matthew Paris* giyes the best account of them, and of the whole proceeding in that affair. He tells you, how the Archbishops, Bishops, Abbots, Priors, Earls, Barons, and other great ones *Aliis Proceribus* being present, **Facta est Recognitio, sive Recordatio partis Consuetudinum & Libertatum antecessorum suorum,** *A Recapitulation or a Rehearsal was made of the Liberties and Customs of their Ancestors* in the time of *H.* 1. and of other Kings; so

it was not a new Law, and but then enacted, but it was indeed a Declaration of what was the Law before, yet then more ſolemnly enjoyned, **In regno obſervari & ab omnibus teneri,** *To be in the Kingdom obſerved and kept by all men:* and this in regard of differences oft times ariſing between the Kings Juſtices and the Clergy, *Propter diſſenſiones & diſcordias ſæpe emergentes inter Clerum, & Juſticiarios Domini Regis*, that Popiſh Clergy being ſtill apt enough to encroach upon the Civil power, which made it the more neceſſary to revive and re-eſtabliſh the old Law and Cuſtom of the Kingdom. Sixteen Articles were then agreed upon, one of which, the eleventh, runs thus, **Archiepiſcopi, Epiſcopi, & univerſe perſone Regni, qui de Rege tenent in Capite habeant poſſeſſiones ſuas de Rege, ſicut Baroniam, & inde reſpondeant Juſticiariis & Miniſtris Regis, & ſequantur, & faciant omnes conſuetudines Regias. Et ſicut ceteri Barones, debent intereſſe Judiciis Curie Regis, quouſque**

que

que perveniatur ad diminutionem membrorum vel ad mortem; *The Archbiſhops, Biſkops, and all the dignified Clergy of the Land, that hold of the King* in Capite, *ſhall hold their poſſeſſions from the King, as a Barony, and anſwer for their Eſtates unto the Kings Juſtices and Miniſters, and ſhall obſerve and obey all the Kings Laws. And together with the other Barons they are to be preſent at all Judgments in the Kings Courts, till it come to require either loſs of member or life.* And this Article as well as the reſt they are ſworn to obſerve. See how the Author expreſſeth it, Hanc Recognitionem ſive Recordationem de conſuetudinibus & libertatibus iniquis Archiepiſcopi, Epiſcopi, Abbates, Priores, & Clerus cum Comitibus, Baronibus, & Proceribus, cunctis juraverunt, & firmiter in verbo veritatis promiſerunt viva voce tenendas & obſervandas Domino Regi & heredibus ſuis, bona fide, & abſque malo ingenio in perpetuum, *This Recognition or Recordation of theſe wicked Cu-*

ſtoms and Liberties did the Archbiſhops, Biſhops, Abbots, Priors, and the whole Clergy, together with the Earls, Barons, and all the Great men ſwear to, and firmly promiſe upon the word of truth, by word of mouth, that they ſhould be kept and obſerved to the King and his Heirs in true faith without any evil meaning for ever.

Now, can there be a more ſolemn eſtabliſhing, and a ſtronger confirmation of any Law to have it inviolably obſerved and obeyed by the whole Nation than this we find here? where beſides the authority of the Parliament, (for theſe great Councils were the Parliaments of thoſe times) there is an Oath, which is the greateſt Obligation that mankind is capable of, making even God a party to it, to ſee it obeyed, and puniſh the tranſgreſſors. And from whom have we the teſtimony of theſe tranſactions to aſſure us of the matter of Fact? From *Matthew Paris* a Monk, one that would not be partial for the Lords Temporal in relating matters to give them more power in Judicature, and leſs to the

Lords

Lords Spiritual, than of right belonged to each, and looking upon this exclusion of the Prelats from the power of Judging in such cases, to be some diminution of their Omnipotency, which they were so ambitious of, he therefore ranks it amongst the **Consuetudines iniquas** *the wicked Customs* of the former times. So we have here **Testimonium irrefragabile** *an irrefragable and invincible testimony*, upon which we may build our faith, and have a certain assurance that there was really such an usage in ancient times, and that it was then in that 10. year of *H.* 2. again ratified and confirmed, since these Monks have so recorded it, and transmitted it to posterity.

The second time time that this received a Confirmation in Parliament was the 11 of *R.*2. which I mentioned before, when the Arch-bishop of *Canterbury* and the other Bishops upon their withdrawing then from the Parliament in regard matters of Bloud were to be there agitated, and determined, *In quibus non licet alicui eorum personaliter interesse*,

tereſſe, as they ſay, *In which it was not lawful for any of them to be preſent in perſon*, did therefore enter a Proteſtation with a *Salvo* to their right of Sitting and Voting in that and all other Parliaments, when ſuch matters were not in queſtion: which Proteſtation of theirs was at their deſire enrolled in full Parliament (as the Record ſaith) **Par commandment du Roy, & aſſent des Seigneurs Temporelz & Communes**, *By the Kings command with the aſſent of the Lords Temporal and Commons.* So indeed it was here a perfect and compleat Act of Parliament, and if it had not been a Law bebefore, would than have been made one.

But it was a Law before, and this needed not, to make it more a Law than it was before; yet certainly what was here done muſt be of ſome ſignification, and add ſome weight, that it may be ſaid at leaſt, that it ſeems to enforce ſome greater compliance with it, and to heighten the offence of ſuch as will not conform to it.

And

And by the way, let me deſire to be well underſtood what I mean by ſaying, This would make it a Law if it was not one before, I do not mean the Proteſtation would be a Law, for a Proteſtation *Modo & Forma* cannot be a Law, but the ſubject matter of it was then enacted; which did conſiſt of two Particulars, the one, That the Prelates had a right and a Priviledge to ſit and vote in Parliament in all other buſineſſes; the other, That they had no Right, nor was it lawful for them to be preſent in Parliament when ſuch buſineſſes were in queſtion: Which one would think they might look upon as a Right and Priviledge, to be exempt from being obliged to attend in ſuch Caſes, Caſes of Bloud: As the Lords Temporal, who are Peers of the Realm, challenge it to be their Right and Priviledge not to be returned in Juries upon the Trial of Commoners. Though, to ſpeak the truth, I doubt thoſe Prelates did not much deſire this Priviledge, but the *Salvo* to their Right of ſitting in all

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Parliaments to have been what they aimed at moſt in their Proteſtation, and which they would have to be enrolled, but the one could not be without the other; and upon no terms would they admit the leaſt ſcruple ſhould be of their right to ſit in Parliament, which their withdrawing at that time might ſeem elſe to call in ſome queſtion as they thought, and therefore they would make that Proteſtation; For that Popiſh Clergy was very ambitious, and loved to have the rule over all perſons and things; we ſee it by *Matthew Paris* how he branded thoſe Conſtitutions of *Clarendon* with terming them *Conſuetudines iniquas*, and the Archbiſhop *Becket* himſelf after he had ſworn to them, repented him of it, and enjoyned a ſevere Penance to himſelf, and ſuſpended himſelf from the Office of the Altar for ſeveral months, till he had the Popes Abſolution. This makes me doubt if the Clergy was of another mind in *Richard* the Seconds time, and if they could not have been well enough contented to have continued

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ſitting as Judges in all Caſes, if the Canon Law had not debarred them, but that being they would make that Proteſtation, conſiſting, as I ſay, of thoſe two parts, both which being ſo approved of by the Parliament, and there enrolled, became then, and ſo continue to be, the Law of the Kingdom: For in thoſe times all Laws were ſo made: Only the ſubſtance of the Law was agreed upon in Parliament by King, Lords, and Commons, and entred in the Journal Book; And the Kings Juſtices did afterwards draw it up into form, and then publiſh it to be the known ſtanding Law of the Kingdom. But that was not needful here, becauſe it was not a new thing, that did then receive its firſt being. Neither, I ſay, was it new before in *Henry* the Seconds time, it appearing by what was then tranſacted, that it was in uſage in *Henry* the Firſts time, only it was ratified in that Great Council of *Clarendon* under *Henry* the Second with a little more ſolemnity, and the addition of an Oath for the better obſervance of it. And

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we may carry it yet a little higher to *Edward* the Confeſſors days, as appears by his Appeal againſt Earl *Godwin* in a Great Council, which was their Parliament, and how long it had been the uſe and practice before that, God knows.

vid. pag. 28. In *E.* 4th. time it was the declared Law of the Land, you have it in the Year-Book of 10 *E.* 4. *Term. Paſ.* n. 35. the words are, **Quant un Sr. eſt endite ceo ſerra maunde en le Parliament & la le Seneſchal d' Engleterre le mettra a reſpondre & il dira De rien culpable, & ſe ſera trie per Pares ſuos, donque les Seignios Eſpirituelx, que ne poient conſent al mort de home, ferront un Procurator en le Parliament & donque le Seneſchal doit examiner primes le pluis puiſne Seignior que eſt, ſil ſoit culpable, & iſſint ſeparatim a toues les Seignios queux ſont la, &c.** *When a Lord is indicted it ſhall be returned into Parliament, and there the Steward of* England *ſhall put him to anſwer, and he ſhall ſay, Not guilty, and this ſhall be tried by his Peers, and then the Lords*

Lords Spiritual, who may not conſent to the death of any man, ſhall make their Procurator in Parliament, and then the Lord Steward ſhall ask the youngeſt Lord, if he be Guilty, and ſo ſeverally all the Lords that are there, &c. This I alledge to ſhew that even by the Law of the Land, the Biſhops cannot be Judges in a Caſe Capital; it is true here is mention made of their making a Proctor, which was **Error Temporis**, *the Errour of thoſe times*, grounded upon what was ſo lately done, (as they looked upon it) though irregularly done in the laſt Parliament of *R.* 2. whom they conſidered as their laſt lawful King; and in truth he was ſo, the three *Henries* that came between being but Uſurpers; and therefore they had, it ſeems, a deference for what was then done, though as I have already ſaid, it was never done before, nor is it in truth a thing very practicable and not at all Parliamentary, to have one man, or two men (as we ſee it was alſo done that Parliament,) repreſent the whole Bench of Biſhops. And more than all this

x. Ibid. 7 H. 25.

this (as I have already obſerved, which it ſeems, was not then thought of) that whole Parliament of *R.* 2. ſtands repealed, and all that was done in it declared by a ſubſequent Act of Parliament to be Null and Void. But this is but by the way; my intent in quoting this Book Caſe, is onely to ſhew that the Biſhops were not excluded Judging in Capital Caſes by the Canon Law alone, but that the Law of the Land did likewiſe confirm it, and the Courts of *Weſtminſter* did ſo conceive of it.

So I think I may well conclude, and with ſome confidence affirm, that Biſhops now are not to be Judges to Sit and Vote in Parliament in any Trial, or part of a Trial, that is, in any circumſtance, which doth any ways lead or conduce to ſuch a Trial of any Capital Offender, but the whole Judgment is ſingly and wholly in the Lords Temporal, and to them onely ſuch Judgments do belong, as was challenged by them in the Caſe of the Earl of *Northumberland*, 5 *H.* 4. and is ſo declared to be in ſeveral other Caſes upon the

the Rolls of Parliament. And having thus delivered you my opinion, and my grounds for that opinion, I ſubmit it to your judgment and reſt,

SIR,

Your Humble Servant.

POSTSCRIPT.

SIR,

AS I was cloſing my Letter, two Papers were brought me, one in Written hand, the other Printed, which maintain an Opinion clean contrary to mine; I ſhall tell you what they ſay, and give my Anſwer to it, then leave it to you to determine, who is in the right.

The written Paper, to prove their right of Judicature in all Caſes, none excepted, declares Biſhops to be Peers

of the Land, and a Third Eſtate in Parliament, and therefore are not to be excluded from being Judges in all Caſes, as well Capital as other.

To prove them Peers of the Land he urges Statute Law, and Common Law; for the Statute Law, he alledges the 25 of *Ed.* 3. c. 6. and the 4 of *H.* 5. c. 6:

Bishops are by these statutes Peers.

Firſt, For the Statute Law, let me tell you, It is not every expreſſion *Obiter* upon the By, that is in the Preamble of a Statute (as this is of Biſhops to be called Peers in theſe Statutes) that makes a thing paſs for Law, except it be by way of Declaration, declaring it to be a Law, or reciting it as a Law before made: And then I ſhall ſhew you how theſe two particular Statutes run, and what they are. That of the 25 *E.* 3. it is true, hath in the Preamble, that the Prelates had prayed the King that their Temporalties thenceforth might not be ſeiſed upon for ſuch contempts, ſith they were Peers of the Land, that is, by their own ſayings they were Peers, for

Irrationally here deny'd. &c

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ſo it was only, the Statute doth not make them ſo. The Record is, that among the Petitions of the Clergy, one is Come Erceveſques & Eveſques tiegnent lour Temporaltees du Roi en Chief & pertant ſont Pieres de la Terre, come ſont autres Countees & Barons, quil vous pleiſe a eur graunter que nul Juſtice pur ſoul contemptz puiſſe deſoremes lour Temporaltees faire prendre, &c. *Seeing Archbiſhops and Biſhops hold their Temporalties of the King* in Capite, *and therefore are Peers of the Land as are other Earls and Barons, that you will be pleaſed to grant unto them, that no Judge may henceforward for meer contempts cauſe their Temporalties to be ſeiſed:* The Anſwer is, That the Law is ſo, and cannot be changed, but the King is willing that in ſuch Caſes a reaſonable Fine may be taken. So you ſee they indeed call themſelves Peers, which the King takes no notice of in his Anſwer, but ſpeaks to the matter of their Petition; And even in his Anſwer intimates, that they are

not in the ſame condition with Earls and Barons, for he ſaith the Law is ſo for them, that is, that they ſhould forfeit their Temporalties for ſuch Contempts, which no man will ſay was the Law for Earls and Barons to forfeit their Lands for any Contempt, but well were they liable perhaps to pay a good Fine for it: So then I may ſay that thoſe Biſhops were a little miſtaken, to affirm that they were Peers of the Land juſt as other Earls and Barons are.

The other Statute is of the 4 *H.* 5. and is only concerning *Ireland*, it ſaith, That by a Statute in *Ireland*, no Iriſhman was to be preferred to any Dignity in the Church, and yet ſome were made Archbiſhops and Biſhops, and they make their Collations to Iriſh Clerks, then follows, *And whereas they are ſaid to be Peers of the Parliament in the ſame Land, they bring with them Iriſh Servants to Parliaments and Councils, who give intelligence to the Iriſh Rebels.* That Statute is now confirmed; And what this makes to prove the Engliſh Biſhops

Biſhops Peers of the Land, I ſee not, nor I think no body elſe can, at moſt it can but declare them to be Peers of the Parliament of *Ireland*, and it is too, even for thoſe Iriſh Biſhops, but that they are ſo ſaid to be, that is, ſaid to be Peers, not that they are ſo.

But to prove that they are not Peers of *England*, I think we have a better Law, even *Magna Charta* it ſelf; It ſaith, That every man who is tried at the Kings ſute muſt be tried by his Peers: Now, if a Biſhop be tried for any Capital offence, he is tried by the Commoners, and that is the Common Law of the Land, it hath ever been ſo, never otherwiſe; then muſt Commoners be his Peers, and he and Commoners muſt be *Pares*. The Great Charter of *Englands* Liberties *Magna Charta* declares them ſo: A Temporal Lord, Duke, Earl, or Baron cannot be Judge in the Caſe of a Biſhop, except it be in Parliament, where the Temporal Lords be the ſole Judges, and thoſe to whom Judgment doth properly belong: nor on the other ſide

can any Biſhop be their Judge, how then can they be ſaid to be *Pares*, Fellow Peers? For my part I ſee not.

Then for their being a Third Eſtate in Parliament (for which that Writer alledges Mr. *Seldens* authority) is a thing ſo contrary to Reaſon, as I can no ways yield to it. Firſt, let me lay this foundation, that I do acknowledge the Subjects of *England* to be divided into three Eſtates, The Nobility, the Clergy, and the Commonalty; theſe are the ſeveral Eſtates of the Kingdom, and the Biſhops are part, and the chief part of one of theſe, *viz.* the Clergy: And ſometimes theſe three Eſtates have joyned in ſome tranſactions, as 9 *H.* 5. in the ratification of a Peace with the King of *France*, *Charles* the Sixth, who had deſired it ſhould be ſo, he having had it ratified in *France* by the three Eſtates there; the Record ſaith, Volenſque idem Sereniſſimus Dominus noſter pro parte ſua dictam pacem & omnia & ſingula contenta in ea modo conſimili

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per ipſum & tres Status Regni ſui jurari, firmari & roborari, prout ex dicte pacis tenore aſtringitur & obligatur, dictam pacem bene & fideliter in omnibus ſe obſervaturum in verbo Regio, & ad Sancta Evangelia per ipſum corporaliter tacta juravit & promiſit, ac dictos tres ſtatus, viz. Prelatos & Clerum, Nobiles & Magnates, nec non Communitates dicti Regni ſui ſecundo Maii ad Palatium ſuum Weſtminſt. ad majora firmitatem & robur Pacis predicte fecit congregari, quibus quidem tribus ſtatibus per Cancellarium ſuum tenorem dicte Pacis & ſingulos articulos ejuſdem ſeriose exponi fecit, &c. *The King willing for his part, that the ſaid Peace, and all the particulars of it ſhould in like manner be ſworn to, confirmed, and ratified by Him and the three Eſtates of his Kingdom, according as he was obliged by the tenour of it to do, did ſwear and promiſe, laying his hand upon the holy Evangeliſts, in the word of a King, that he would well and faithfully*

observe and keep it in every circumstance; And the said three Estates, to wit, the Prelates and Clergy for one, the Nobles and Great men for another, and the Commons for the third, he caused to come before him the second of May *at his Palace of* Westminster *for the better confirmation and strengthening of the Peace, to which three Estates he caused his Chancellour to declare what the Peace was, and every Article thereof* &c. Here indeed the Prelates, and all the Clergy together with them, are declared to be one of the three Estates of the Kingdom, which is to be understood as they are assembled in the Convocation, where all are present in their Persons, or their Representatives, but this is no part of the Parliament, nor is it any ways entrusted with the Legislative power, though it assemble in Parliament time. And in 11 *H.*7. the very same Case hapned again, and the three Estates of the Kingdom joyned with the King in the Ratification of a Peace with *France* in the same manner.

But the three Estates of Parliament are clean another thing, Each must have

have a Negative voice to all that paſſeth there. If the Major part of the Houſe of Commons be againſt any thing there propoſed, there is an end of it, it is rejected. It is the ſame in the Houſe of Lords, and the Biſhops are intermingled with the Temporal Lords in making up that Majority, as part of that Majority: whereas were they one of the Eſtates, reaſon would they ſhould vote by themſelves, ſeparately from the other L^ds, which would make another Eſtate; but they do not only not vote apart by themſelves the whole body of them together, but even that body is divided and ſeparated within it ſelf, one part from another. For the two Archbiſhops give their Votes after all the Nobility have given theirs, and the reſt of the Biſhops between the Barons and the Viſcounts, ſo that the Barons excepted, all the reſt of the Peers, Dukes, Marqueſſes, Earls, and Viſcounts divide the Archbiſhops from the Biſhops: If then they be an Eſtate, it is an Eſtate within an Eſtate, like a Neſt of Boxes one within another, which how

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agreeable it is to reaſon, let any man judge.

Beſides, would it be for the honour of the Houſe of Lords, that two Eſtates muſt be put together to keep the ballance even with the Houſe of Commons, who are but one Eſtate, and that their two ſhould ſignifie no more than that one? And moſt clearly it would be a great diſparagement to the Peerage of the Kingdom, the Temporal Lords, and would make them to be a poor Eſtate, that another Eſtate muſt be joyned to them, to make up their Negative voice, and ſet them upon even ground with the Houſe of Commons.

But this is further to be ſaid, were the Biſhops one of the Three Eſtates, a Parliament could not be held without them, no Law, no Act of Parliament could be made, if the Major part of the Bench of Biſhops did not agree to it; but we know it to be otherwiſe in point of fact. Parliaments have ſate without a Biſhop, and Acts of Parliament have been made the Biſhops diſſenting,

diſſenting, and our Law-Books ſay it may be ſo in point of Law: That it hath been ſo, Biſhop *Jewel* acknowledges it in his Defence of the Apology of the Church of *England*, *p.* 522. he bids you read the Statutes of *Ed.* 1. and you will find, that in a Parliament ſolemnly holden by him at St. *Edmunds Bury* the Archbiſhops and Biſhops were quite ſhut forth; and yet the Parliament held on, and good and wholſom Laws were there enacted, the Record ſaying, **habito Rex cum ſuis Baronibus Parliamento, & Clero excluſo,** &c. *The King holding a Parliament with his Barons, and excluding the Clergy,* &c. *Crompton* hath this likewiſe in his Book of Courts under the Title, *Parliament*, p. 19. b. So certainly that King did not believe his Clergy to be a Third Eſtate of his Parliament, or he would never have left them out: for it muſt neceſſarily have followed that his Parliament would have been lame and imperfect: But doubtleſs he knew the Law to be, as all the Judges of *England* ſaid it was,

was in *Henry* the Eighths time when the queſtion was, as the Title of the Book Caſe runs in *Keilways* Reports, *p.* 180. b. **Lou Supreme Juriſdiction perteigne al Roy ou al Pape,** *To whom the Supreme Juriſdiction belongs to the King or the Pope?* For that hath ſtill been in competition between the Crown and that Clergy, I mean the Popiſh Clergy. It is in Dr. *Standiſhes* Caſe, 7 *H.* 8. p. 184. b. **Les Juſtices diſoient que noſtre Sr. le Roy poit aſſez bien tener ſon Parlement per luy & ſes Temporal Seigniors & per ſes Commons, tout ſans les Spirituals Seigniors, car les Spiritual Seigniors nont aſcunt place en le Parlement chamber per reaſon de lour Spiritualtie, meis ſolement per reaſon de lour Temporal poſſeſſions,** *The Judges ſaid, That our Lord the King might well enough hold his Parliament by himſelf and the Lords Temporal and his Commons, wholly without Lords Spiritual, for the Lords Spiritual have no place in Parliament by reaſon of their Spiritualty, but by reaſon of their Temporal*

poral poſſeſſions; that is, holding their Lands, their Temporal poſſeſſions in nature of Baronies, *ſicut Baroniam*, as it is in the *Conſtitutions of Clarendon*, not that they were truly and really Barons, enobled in bloud, but by their Tenure of ſuch Land dignified to ſit in Parliament, and do the King ſervice there, as the Temporal Lords by their Tenure were bound to do.

For this was the Policy of *William* the Firſt, he divided all the Lands that eſcheated to him by his conqueſt into ſo many Knights Fees, and ſo many Knights Fees he erected into a Barony, the Temporalties of Biſhops likewiſe, and ſo of many Abbots and Priors he erected into Baronies, all to hold of him *in Capite*, and upon account of thoſe Baronies both the Temporal Lords and the Spiritual Lords, not only Biſhops, but alſo thoſe Abbots and Priors had of right place in Parliament, and were bound to ſerve him there: Now, I would ask if they all holding by one Tenure, and by that

Tenure

Tenure ſitting in Parliament could poſſibly be imagined to be two different Eſtates? Certainly, they could not be then two different Eſtates, for they were all Feodal Barons; And what hath ſince hapned to make a difference? The change hath been only this; The Temporal Lords holding ſo by their Tenure grew ſo numerous, that King *John* put them into two ranks, of *Barones Majores*, and *Barones Minores*, and only the *Majores* had Writs of Summons to come to Parliament. Afterwards in *Richard* the Seconds time Barons were created by Patent, and ſo had Place and vote in Parliament. I ask now, if it be probable, nay, if it be poſſible, that this ſhould alter the conſtitution of Parliament, that that Houſe which before conſiſted but of one of the Eſtates, ſhould now be divided into two Eſtates. They are ſtill qualified to be Members of Parliament as before, a Baron ſate as a Baron, an Earl as an Earl; Being made by Patent, or by Writ, or by holding ſuch a proportion of Land, alters not

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the caſe as to their ſitting in Parliament, for it is being of ſuch a degree, which makes them Peers of Parliament, how they roſe to that degree is not material. And what ſhould make the Lords Spiritual, who have received no change in their being called to be Members of that Houſe, to be now an Eſtate by themſelves, which they were not before? I profeſs I ſee not the leaſt colour of reaſon to think there ſhould be any change, but as they were in the beginning, ſo they are ſtill, no other than Fellow Members of that Houſe with the Temporal Lords, and together make up one Houſe.

But this is alſo to be conſidered, that if the Biſhops were a Third Eſtate of Parliament, not only the Parliament could not be held without them, but nothing could paſs in Parliament, that at leaſt the Major part of them ſhould not aſſent to: But ſo far from that, not only what we find in the Journals of former times, but daily experience tells us, that Acts have paſſed not only when

when the Major part of that Bench was againſt them, but many times when the whole Bench was ſtrongly of another mind.

20 *R.* 2. The Biſhops upon occaſion of the Statute of Proviſors enter a Proteſtation *againſt whatſoever ſhould be done in derogation or reſtriction of the power of their Holy Father the Pope, ſaying they were ſworn to his Holineſs, and to the Court of* Rome: Theſe were likely to make a good Third Eſtate of an *Engliſh* Parliament: And is it not then a wonder that any Engiiſh man ſhould deſire to bring Popery in again, for Biſhops to controule both King and Parliament? Would it not ſet even Monarchy it ſelf one degree lower? Sure it would: But this is by the way. Conſider further, that if they had had ſuch a power of being a Third Eſtate in the days of Queen *Elizabeth*, thoſe good Acts for a Reformation in Religion had never paſſed, and the Reformation had never been. 1 *Eliz.* The Bill for reſtoring the firſt Fruits and Tenths to the Imperial

perial Crown of *England*, which paſſed *February* 4. The Bill for reſtoring the Supremacy to the Crown, and repealing divers Acts made to the contrary, which paſſed *March* 18. The Bill giving authority to the Queen upon avoidance of a Biſhoprick to take ſome part of the Temporalties into her hands, recompenſing the ſame with Impropriate Parſonages, which paſſed *April* 7. All the Biſhops preſent were againſt the paſſing of theſe Bills. And before that, in *Edward* the Sixths time, they were againſt the Bill for Prieſts to marry, which paſſed *Feb.* 19. 2 *E.* 6. So the Bill for ordering Eccleſiaſtical Miniſters, giving power to Six Prelates, and Six other men, learned in the Laws, to ſet down the form and manner of their Conſecration, which paſſed *Jan.* 25. 3 *E.* 6. The Bill for nominating thirty two Perſons to peruſe the Eccleſiaſtical Laws, which paſſed *Jan.* 31. The Bill for aboliſhing and putting away divers ſuperſtitious Books, as Legends, Miſſals, Proceſſionals, and the like, and

taking away Images out of Churches and Chappels, which paſſed alſo that Parliament. All theſe good Bills the Biſhops were againſt, yet they paſſed into Laws, and were the foundation of our Reformation, which, had they been a Third Eſtate, had never been laid, for thoſe Bills had not paſſed. But you will ſay perhaps, that we need not fear ſuch miſchiefs and inconvenience from our Proteſtant Biſhops, and I grant it, nor do I urge theſe things with any ſuch apprehenſion; I only ſhew you what the Popiſh Biſhops did then, and that if they had been a Third Eſtate, ſuch miſchiefs would have followed upon it, and thence to infer, That they were not in thoſe times ſo accounted, and that our Proteſtant Biſhops cannot then pretend to it now, They then, and Theſe now having Place and Vote in Parliament upon the ſame terms.

But then we have good Authority to inform us which are truly the Three Eſtates: King *James* ſeems to make it clear in a Speech he made at the Prorogation of the Parliament in the year 1605.

3. Eſtates, King, Lords, Commons

1605. the words are theſe, *As for the thing it ſelf* (that is, the Parliament) *it is compoſed of a Head and a Body, The Head is the King, the Body are the Members of the Parliament; This Body again is ſubdivided into two parts, the Upper and the Lower Houſe. The Upper Houſe compounded partly of Nobility, Temporal men, who are Heritable Counſellours to the High Court of Parliament by the honour of their Creation and Lands; And partly of Biſhops, Spiritual men, who are likewiſe by the virtue of their Place and Dignity Counſellours, Life Renters, or* advitam *of this Court. The other Houſe is compoſed of Knights for the Shires and Gentry, and Burgeſſes for the Towns. But becauſe the number would be infinite for all the Gentlemen and Burgeſſes to be preſent at every Parliament, therefore a certain number is ſelected and choſen out of the great Body, ſerving only for that Parliament, where their Perſons are the Repreſentation of that Body.* You ſee that wiſe King makes the Body to conſiſt of Two Parts, the Upper Houſe, or the Houſe

of Lords to be one of thoſe parts, conſiſting of Lords Temporal, and Lords Spiritual, who together make one part; And the Houſe of Commons another part: It is true, he calls neither of them an Eſtate, but moſt certain he cannot be thought to underſtand the Spiritual Lords to be an Eſtate by themſelves, making them to be but a Part of one of the Parts of that Body: For by the ſame reaſon he may be ſaid to make the Houſe of Commons conſiſt of two Eſtates, ſaying, it is compoſed of Knights of the Shires, and Burgeſſes for the Towns. But King *Charles* the Firſt is plainer in his expreſſions, in his Anſwer to the Nineteen Propoſitions ſent to him from the two Houſes, *June* 2. 1642. He tells them, *That neither one Eſtate ſhould tranſact what is proper for two, nor two what is proper for three.* And in that ſame Anſwer he ſaith a little after, *It is moſt unreaſonable that two Eſtates propoſing ſomething to the Third, the Third ſhould be bound to take no advice whether it were fit to paſs, but from thoſe two, who*

did

did propoſe it. Nothing can be clearer than this, to ſhew what the opinion of that good King was concerning the three Eſtates in Parliament.

And 2 *H.* 4. n. 32. It is ſo declared by the Houſe of Commons even to the King himſelf, and to the Lords, *That the three Eſtates of Parliament are the King, the Lords Spiritual and Temporal, and the Commons, who ſhould all be at an Unity among themſelves, and therefore hearing there were ſome differences between the Lords, they humbly prayed the King to compoſe them.*

And *Stephen Gardiner* Biſhop of *Wincheſter*, ſometime Lord Chancellor, an ancient Parliament-man in *Henry* the Eighths time, who well underſtood the conſtitution of Parliaments, in his Letter to the Lord Protector in *Edward* the Sixths time, which Letter is in the ſecond Volume of the Book of Martyrs, Printed in 1641. p. 7. doth acknowledge it, and ſaith, That the three Eſtates make a Law, and compares the three Eſtates in Parliament to the three Chriſtian Vertues, Faith,

Hope, and Charity, and ſaith, That it were the ſame abſurdity and untruth to ſay the Higher Houſe and the Lower Houſe exclude the King in the Office of making Laws, as it would be in Religion to ſay, that Faith excludeth Charity in the Office of Juſtification. Here you have the Teſtimony of a Biſhop: I confeſs, a Popiſh Biſhop, as you may ſee by his application of this Simile, to make Charity (that is, works of Charity) to have a part in Juſtification. But I meddle not with his Divinity: As to that which he ſaith of the Eſtates in Parliament, he is in the right, and he was one that knew well enough what was due to the Order of Biſhops, even to the full extent of it, and would not have ſhortned it the breadth of one hair, yet he makes them not an Eſtate by themſelves, but as joyned with the Lords Temporal.

Then for the Common Law, you have *Finch* in his Book of Law dedicated to King *James*, the firſt Chapter of the ſecond Book, *p.* 21. who ſaith the very

very ſame thing in very plain terms: His words are theſe, **Laſſemblie de ceux trois Eſtates c'eſt aſſavoir, Roy, Nobilitie, & Commons, qui ſont le Corps del Realme, eſt appel une Parlement, & lour decree un Act de Parlement, car ſans touts troys (come ſi ſoit fait per Roy & Seignioꝛs, mes rien parle del Commons) neſt aſcun Act de Parlement,** *The Aſſembly of the Three Eſtates, that is to ſay, King, Nobles, and Commons, who are the Body of the Realm, is called a Parliament, and their Decree is an Act of Parliament, for without all three (as if it were done by the King and Lords, and no mention of the Commons) it is no Act of Parliament.* Can any thing be plainer?

You ſee now with how little appearance of truth the Writer of that Paper takes upon him to declare Biſhops to be either Peers of the Land, or one of the Three Eſtates, and what ill Topicks he hath choſen to prove them to have right of Judicature in all Caſes Criminal and Capital, for that is his Aſſertion upon it.

For what he cites out of ſome Year-books, that in ſome pleadings their Counſel calls them Peers, will not make them ſo; nay, ſhould the Judges themſelves ſtile them Peers, as perhaps they might complement the potent Clergy of thoſe days, it could not alter the Law of the Land, which makes Commoners their Peers, ſeeing they are to be tried by Commoners.

As for matter of Fact, to prove that they have Judged in Capital Caſes, he cites the Proteſtation in the eleventh of *R.* 2. and then their making their Procurator, and ſo Judging by Proxy in the 21 of *R.* 2. To which I need ſay nothing in this Poſtſcript, having ſo largely in my Letter treated of it.

Then he gives many Precedents of their voting in Bills of Attainder, which is all Not to the purpoſe, for that is not in Queſtion. Acts of Attainder are Laws, and every Freeman is ſuppoſed to give his Conſent to every Law, either by his Repreſentative, or in Perſon if a Member of Parliament; And Biſhops being Members may I think claim

claim to do it Perſonally.

So I have done with the Paper, and come to the Printed Book, ſtiled, *The Honours of the Lords Spiritual aſſerted*; And Six Chapters are taken up in blazoning their Honour, which no body endeavours to take from them, nor do I think it to be any part or degree of Honour, to judge men to death. It is certainly an employment which in my opinion no body will envy to any that hath it. Then for thoſe great Places which the Biſhops enjoyed here in *England*, mentioned in the fifth Chapter, I no ways wonder at it; we know, that Popiſh Clergy had ambition enough to covet to have the whole rule, and in thoſe blind and ſuperſtitious times power enough to obtain what they had a mind to, both Prince and People in a manner awed by them; who yet ſometimes would complain, and break out a little, as Scholars ſometimes riſe againſt their Schoolmaſters. So 45 *E.* 3. The two Houſes joyn, *Countes*, *Barones & Communes*, and repreſent to the King, how the Government

vernment of the Kingdom had been a long time in the hands of the Clergy, **per ent grant miſchiefs & damages ſont avenuz en temps paſſe & pluis purroit eſchier en temps avenir al diſherison de la Coronne, & grant prejudice du Royalme,** *Whereby great miſchiefs and damages have happened in times paſt, and more may fall out in time to come, to the diſheriſon of the Crown, and great prejudice to the Realm*; And therefore they humbly pray the King, that he would employ Laymen. So 20 *R.* 2. The Commons complain, *That the King kept ſo many Biſhops about him in his Court, and advanced them and their followers.* Therefore you ſee it was not always pleaſing to the Kingdom: But all this is by the By; though that Author takes a great deal of pains to enlarge himſelf upon this Subject, which is not at all to our purpoſe, nor deciding the point in queſtion one way or other.

In his two laſt Chapters, the ſeventh and the eighth only, he toucheth upon

on it. He firſt gives this for a Rule, *That it was the common uſage and right of the Biſhops in ancient times to ſit and vote in Parliament in all Caſes, as well Criminal as otherwiſe, either by themſelves or their Proxies.* As for their Proxies, as I have already ſaid, it was never done but in one Parliament, which Parliament is repealed, and all that was done in it, of no ſignification. And beſides, as I have already told you in my Letter, if that Parliament had not been repealed, yet that unparliamentary Nonſenſical action of the whole Bench of Biſhops, and all the Clergy with them, empowering one Man, as they did Sir *Thomas Percy*, to give one Vote for them all, ſhews the manifeſt indiſpenſable unlawfulneſs of their being Perſonally Preſent, that rather than that ſhould be, ſuch an Irrational Unprecedented thing ſhould be admitted of; which is my Anſwer to all that he ſaith, and to the Precedent that he quotes out of the 21 of *R.* 2.

Now let us examine what he ſaith of their

their being in Perſon preſent at ſuch Trials. He quotes *Bromptons* Chronicle, reciting among the Laws of King *Athelſtan* this concerning Biſhops, I will cite *Brompton*'s words right as they are, **Epiſcopo jure pertinet omnem rectitudinem promovere Dei, viz. & ſeculi.** *It appertains of right to a Biſhop, to promote that which is right both concerning God and the World.* A little after he ſaith, **Debet etiam ſedulo pacem & concordiam operari cum ſeculi Judicibus,** *He ought likewiſe diligently together with the ſecular Judges to promote Peace and Concord.* After he ſaith, **Debent Epiſcopi cum ſeculi Judicibus intereſſe Judiciis ne permittant ſi poſſint, ut aliqua pravitatum germina pullulaverint,** *The Biſhops ought to be preſent in Judgments with the Secular Judges, not to ſuffer any buds of wickedneſs to ſprout if they can hinder it.* Then he tells you what they muſt do in their Judgings, ſee that every man have right, that rich men do not oppreſs poor men, nor Maſters their Servants, and the like,

and

and to look to Weights and Meaſures, that there be no cozening nor cheating, but that they may live like Chriſtians. Here is nothing of judging a Capital Crime; far from it.

His next Authority is out of Sir *Henry Spelmans* Gloſſary upon the word **Comes**; there it is, **Comes præſidebat foro Comitatus, non ſolus, ſed adjunctus Epiſcopo, hic ut jus divinum, alter ut humanum diceret, alterque alteri auxilio eſſet & conſilio, Præſertim Epiſcopus Comiti; Nam in hunc illi animadvertere ſepe licuit, & errantem cohibere,** *The Earl did preſide in the County Court, not alone, but joyned with the Biſhop: He, to deliver what was Gods Law; the other, what was Mans Law: And that the one ſhould help and counſel the other; eſpecially the Biſhop to do it to the Earl, for it was lawful for him ſometimes to reprove the other, and to reduce him, bring him into order if he went aſtray.* He leaves out what the Biſhops work was, he omits that clauſe, *Epiſcopus ut jus Divinum diceret,* for this

this was not to try Capital Crimes: But Sir *Henry Spelman* tells us further, that that Court had cogniſance but of petty matters, De cauſis Magnatum & Potentiorum non cognovit Comes, nam hæ ad Aulam Regiam deferendæ, Pauperum tantum & minus potentum judicabat. Hinc & Legibus noſtris hodie prohibetur debiti aut injuriarum actiones in Comitatu intendere, ſi rei litigatæ valor non ſit minor 40 ſolidis, *The Earl hath not cogniſance of great mens buſineſs, for ſuch matters are to be brought into the Kings Courts, he only judges poor mens Cauſes. Hence it is, that by our Law Actions for Debt and Treſpaſſes are not to be commenced in the County Court, if it be for above the value of* 40 *Shillings.* Judge now I pray you, what all this makes to prove that Biſhops have right to judge of Treaſon, Felony, and thoſe tranſcendent Crimes which deſerve death.

He then quotes Mr. *Selden*, and makes him ſay, in his Introduction to his Treatiſe of the Priviledges of the

Barons

Barons of *England*, that *Omnes Prælati & Magnates* had this Priviledge till the Prelates loſt it by the Parliament of 17 *Car.* 1. I find no ſuch thing there, he ſaith, That the Prelacy had heretofore the firſt place in the Summons, but that they had then loſt it. And this I obſerve further, that Mr. *Selden* makes the whole upper Houſe to be but one Eſtate whether the Biſhops be there or No; It was one Eſtate formerly when the Biſhops had the Priviledge of ſitting there, and when they had the firſt place in the Summons, and it was one Eſtate then in Mr. *Seldens* time when they had loſt that Priviledge, but our Aſſertor in the Printed Paper would take no notice of this.

Now I come to his Precedents, he firſt begins with their Proxies, and cites many Parliaments where Biſhops gave Proxies, which no man denies, and they do it ſtill, only they give their Proxies now only to Biſhops like themſelves who are Members of the Houſe, not to ſuch as are no Members, as it ſeems they did then: But giving

Proxies

Proxies to repreſent the whole Bench of Biſhops, or any one Biſhop in any Judgment of death, except in that one Parliament of 21 *R.* 2. I utterly deny. Indeed he tells us of the 2 *H.* 4. and 2 *H.* 5. that they did it it there in thoſe Parliaments, but I dare ſay he cannot find it there, I am ſure I cannot, and I do verily believe he never looked there, but that he takes it upon truſt out of the Margin of *pag.* 125. of Mr. *Seldens* Book of the Priviledges of the Baronage, where indeed there is ſuch a quotation, but miſplaced by the Printer, having reference to what is ſaid at the end of the Paragraph, of *Thomas* Earl of *Salisbury*, 2 *H.* 5. endeavouring to reverſe the Attainder of his Father, *John* Earl of *Salisbury*, who was attainted 2 *H.* 4. and not at all concerning what is ſaid of Proxies in the firſt part of the Paragraph, as our Aſſertor would here apply it.

Then he cites a Precedent or two to make out that Biſhops were perſonally preſent at the giving of ſome Judgments of Death, which if they be truly

ly related, he ſaith ſomething, but I believe they will be found to be of as little weight, as all he ſaid before: His firſt is among the Pleas of the Crown, 21 *R.* 2. of the Impeachment, as he calls it, of the Earl of *Arundel*, and others, by the Lords *Appellants*, the Earls of *Rutland*, *Kent*, *Huntington*, and others. He ſaith the Earl of *Arundel* being brought to the Bar by the Lord *Nevil*, Conſtable of the Tower, that the Articles exhibited againſt him by the Lords *Appellants* were read, to which he only pleaded two Pardons, which Pardons not allowed, the Lords *Appellants* demanded Judgment againſt him: *Whereupon the Lord Steward, by the Aſſent of the King, Biſhops, and Lords, adjudged the ſaid Earl guilty, and Convict of all the Articles, and thereby a Traitor to the King and Realm, and that he ſhould be therefore Hanged, Drawn and Quartered.* This our Aſſertor ſaith, who quotes Sir *Robert Cottons* Collections for it, and there indeed it is ſo, but methinks one ſhould not venture to quote a Record upon any mans Alle-

gation, without conſulting the Record it ſelf, and that I am ſure he hath not done, for it ſaith expreſly, that it was only the Lords Temporal and Sir *Thomas Percy*, Proctor for the Prelats, that gave that Judgment. The words of the Record are, **Sur quoy le dit Duc** de Lancaſter **per commandement du Roy & toutz les Srs. Tempozels & Mr.** Thomas Percy **aiant poair ſufficiant des Prelatz & Clergie du Roialme d'Engleterre come piert de Recozd en le dit Parlement per aſſent du Roy agarderent le dit Counte d'** Arundel **coupable & convict de toutz les pointz dount il eſt appellez, & per taunt luy ajuggerent Traitour au Roy & au Roialme, & quil ſoit treinez, penduz decollez & quarterez,** *Whereupon the ſaid Duke of* Lancaſter *by the Kings Command, and all the Lords Temporal, and Sir* Thomas Percy *being ſufficiently empowered by the Biſhops and Clergy of the Kingdom of* England, *as appears upon Record in the ſaid Parliament, did by the Kings aſſent declare the ſaid Earl of* Arundel

Arundel *guilty and convict of all the points of which he was accuſed, and therefore did adjudge him a Traitor to the King and Realm, and that he ſhould be drawn, hanged, his head cut off, and body quartered.* You ſee the Biſhops were none of them preſent, but their Procurator was, to which in my Letter I have largely ſpoken, and need not repeat it here.

He urges alſo a Precedent in this ſame Parliament, of the Commons by the mouth of their Speaker Sir *John Baſſy*, praying the King, *That for that divers Judgments were heretofore undone for that the Clergy were not preſent, that the Clergy would appoint ſome to be their Common Proctor, with ſufficient authority thereunto.* I have already ſhewed, that this whole Parliament was repealed, for the extravagant things that were done in it, of which this was one: And therefore nothing that was then done can ſignifie any thing to be a leading Caſe any ways to be followed. And this as little as any, except it could be made appear, which I am confident it cannot,

that ſome Judgment had been reverſed upon that account becauſe the Prelates were not preſent, and had not given their Aſſent to it. Indeed 2 *H.* 5. *Thomas Montacute*, Earl of *Salisbury*, attempted it, brought his Writ of Error to reverſe the Judgment given 2 *H.* 4 againſt his Father, *John* Earl of *Salisbury*, and did aſſign that for an Error as the Record ſaith, Item **Erroꝛ de ceo que le dit** John **ſuſdit Count duſt foꝛfaire terres & tenements ſans aſſent des Prelates, qui ſont Piers en Parlement les queux ne furent mye faits parties as Declaration & Juggementz avandits,** Item, *An Error in this, that the foreſaid Earl* John *ſhould forfeit Lands and Tenements the Prelates not aſſenting, who are Peers of Parliament, yet were not at all made parties to the aboveſaid Declaration and Judgments.* But this was adjudged to be no Error, and the Condemnation of his Father to have been juſt and Legal: And I am very confident that this is the only Precedent of ſuch an Attempt, and yet it makes a ſtronger argument againſt

againſt it, that it was endeavoured, and rejected, for now it is a Judged Caſe. And beſides, as I have already obſerved, this deſire of the Commons, of their making a Proctor ſhews what the opinion of thoſe times was, that the Biſhops could not be perſonally preſent at ſuch Judgments, which is all that is now in queſtion between us.

His next Precedent is 3 *H.* 5. when *Rich.* Earl of *Cambridge*, and others were tried for Treaſon for levying War againſt the King, the Biſhops then perſonally ſitting in Parliament, as he ſaith, and he bids us ſee the Record in the Tower, which I dare ſay he had not done himſelf, for then he would have found it contrary to what he aſſerts, that *Richard* Earl of *Cambridge*, and *Henry* Lord *Scroope* with him were not Tried nor condemned in Parliament as he ſaith they were, but by a ſpecial Commiſſion directed to the Duke of *Clarence*, and other their Peers, Earls, and Barons at *Southampton*, and were there condemned and executed; but the whole Proceedings againſt them were afterwards

afterwards brought into Parliament at the desire of the Commons, and were there at their desire likewise ratified and confirmed, and the Bishops then were and might be present, for I look upon it as an Act of Parliament, yet not attainting them, but confirming their Attainder, for they were Convicted, Condemned, and Attainted before at *Southampton*.

His last Chapter of Precedents from *H.*8. to the 29 *Eliz.* is only of Bills of Attainder, and so acknowledged by him, and therefore Nothing to the purpose. As I have said before those Bills are Laws, though Private Laws, whereto every Freeman of *England* doth consent either in Person or Represented; and Bishops are or should be all present at the passing of them, for then they act as Members of the House of Lords in their Legislative capacity: But for their being Judges in any Trial of Life and Death, or part of a Trial, when the House proceeds in a Judicial way, I see no reason by all that hath been said on the other side, to change my opinion,

on, That they ought not. Sir, you ſee what is ſaid on both ſides, be you Judge, who is in the right.

FINIS.